(23,024)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 171.

FRANK N. THOMAS, PETITIONER,

vs.

CONRAD H. MATTHIESSEN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

Todd & Detweiler (Inc.), Printers, Washington, D. C., September 16, 1913.

a United States Circuit Court of Appeals for the Second Circuit.

FRANK N. THOMAS, Plaintiff in Error (Plaintiff Below),
vs.
CONRAD H. MATTHIESSEN, Defendant in Error (Defendant Below).

TRANSCRIPT OF RECORD.

Error to the Circuit Court of the United States for the Southern District of New York.

Printed under the direction of the clerk.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court, before you, or some of you, between Frank N. Thomas, Plaintiff and Conrad E. Matthiessen, Defendant, a manifest error hath happened, to the great damage of the said Frank N. Thomas, Plaintiff, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 20th day of February, 1911, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

2 Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 24th day of January, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-fifth.

[L. S.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.
LEARNED HAND,
U. S. Judge.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify that the following pages numbered from 3 to 93 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of Frank N. Thomas, Plaintiff in Error, against Conrad H. Matthiessen, Defendant in Error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 18th day of April, in the year of our Lord one thousand nine hundred and eleven and of the Independence of the United States the one hundred and thirty-fifth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

3 (Endorsed:) The U. S. Circuit Court of Appeals for the Second Circuit. Frank N. Thomas, Plaintiff in Error, vs. Conrad H. Matthiessen, Defendant in Error. Writ of Error. Rollins & Rollins, Attorneys for Plaintiff in Error. Due service of a copy of the within Writ of Error is hereby admitted this 25th day of January, 1911. Steele & Otis, Attorneys for Defendant in Error. U. S. Circuit Court, Southern District, N. Y. Filed Jan. 25, 1911. John A. Shields, Clerk.

United States Circuit Court, Southern District of New York.

FRANK N. THOMAS
against
CONRAD H. MATTHIESSEN.

To the Above-Named Defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan in the City of
4 New York, this 9th day of March, in the year one thousand nine hundred and eight.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

ROLLINS & ROLLINS,
Plaintiff's Attorneys.

Office and Post Office Address, 32 Nassau Street, Borough of Manhattan, New York City.

Circuit Court of the United States for the Southern District of New York.

FRANK N. THOMAS, Plaintiff,
against
CONRAD H. MATTHIESSEN, Defendant.

Amended Complaint.

The plaintiff above named, by Rollins & Rollins, his attorneys, for an amended complaint, alleges, upon information and belief:

I. That the plaintiff is a citizen of the State of California and resides therein in the City of Pasadena, and the defendant is a citizen of the State of New York, and resides therein at Irvington, County of Westchester.

II. That it is provided by the Constitution of the State of California, set forth in Section 3 of Article XII thereof, as follows:

"Each stockholder of a corporation, or joint stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation of association,"

and in Section 15 of Article XII thereof, as follows:

"No corporation organized outside the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State."

And that at all the times hereinafter mentioned the said provisions of said Constitution were, and now are, in full force and effect in said State.

That the Statutes of the State of California set forth in Section 322 of the Civil Code thereof, it is provided as follows:

"Each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation. Any creditor of the corporation may institute joint or several actions against any of its stockholders, for the proportion of his claim payable by each, and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered against each, in conformity therewith. If any stockholder pays his proportion of any debt due from the corporation, incurred while he was such a stockholder, he is relieved from any further personal liability for such debts, and if an action has been brought against him upon such debt, it shall be dismissed, as to him, upon his paying the costs, or such proportion thereof as may be properly chargeable against him. The liability of each stockholder is determined by the amount of stock or shares

owned by him at the time the debt or liability was incurred; and such liability is not released by any subsequent transfer of stock. The term stockholder, as used in this section, shall apply not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appear on the books in the name of another; and also to every person who has advanced the installments or purchase money of stock in the name of a minor, so long as the latter remains a minor; and also to every guardian, or other trustee, who voluntarily invests any trust funds in the stock. Trust funds in the hands of a guardian, or trustee, shall not be liable under the provisions of this section, by reason of any such investment; nor shall the person for whose benefit the investment is made be responsible in respect to the stock until he becomes competent and able to control the same; but the responsibility of the guardian or trustee making the investment shall continue until that period. Stock held as collateral security, or by a trustee, or in any other representative capacity, does not make the holder thereof a stockholder within the meaning of this sec-
7 tion, except in the cases above mentioned, so as to charge him with any proportion of the debts or liabilities of the corporation; but the pledgor, or person or estate represented, is to be deemed the stockholder, as respects such liability. In corporations having no capital stock, each member is individually and personally liable for his proportion of its debts and liabilities, and similar actions may be brought against him, either alone or jointly with other members, to enforce such liability, as by this section may be brought against one or more stockholders, and similar judgments may be rendered. The liability of each stockholder of a corporation formed under the laws of any other State or Territory of the United States, or of any foreign country, and doing business within this State, shall be the same as the liability of a stockholder of a corporation created under the Constitution and laws of this State,"

and that the said law was as all the times hereinafter mentioned, and now is, in full force and effect in said State.

III. That Wentworth Hotel Company is a corporation organized under the laws of the Territory of Arizona, on or about the 12th day of April, 1906.

IV. That in and by the Articles of Incorporation of said Wentworth Hotel Company it was provided as follows:

"The principal place in which the business of said corporation, within the Territory of Arizona, is to be transacted, is Tucson, Pima County, Territory of Arizona, and the principal place of said corporation outside of the Territory of Arizona, shall be in the
8 City of Los Angeles, in the State of California, with the power in the Board of Directors to change the principal place of business of said corporation, outside of the Territory of Arizona, from the City of Los Angeles to the City of Pasadena, if in their judgment they should so elect, at which place, when so elected, meetings of stockholders and of the Board of Directors may be held, and the corporation may have such branch offices, either within

or without the Territory of Arizona as may be established by its Board of Directors."

That the words "City of Pasadena" used in said Articles of Incorporation, referred to and designated the City of Pasadena, located within the State of California. That in and by said Articles of Incorporation it was also provided that the general nature of the business to be transacted by said corporation was to be inter alia as follows:

"(*a*) To buy, own, lease, sell, and otherwise acquire real property, anywhere that its Board of Directors may elect; to build, maintain, operate and carry on, in all its branches, the business of hotel keeping and all that is incidental or necessary for the full and complete carrying out of all the purposes and objects that could possibly come within the scope of its business.

(*b*) To build, repair, maintain, acquire by purchase or otherwise, and operate, gas or electric works, of all kinds and descriptions, in the Territory of Arizona or the State of California, or elsewhere that may be determined by its Board of Directors, both for its own use in the hotel business and for the purpose of selling and disposing of the same, to whomsoever may desire to purchase, when
9 it has any more than is necessary for its own purposes."

That the amount of capital stock of said corporation was, in and by said Articles of Incorporation, fixed at the sum of Three hundred fifty thousand dollars ($350,000), divided into thirty-five hundred (3,500) shares of the par value of one hundred dollars ($100) each.

V. That prior to the incorporation of the said Wenworth Hotel Company the defendant subscribed to, and agreed to pay for, one thousand (1,000) shares of the capital stock of said Wentworth Hotel Company, and did make and execute in writing an instrument, of which the following is a copy:

"It is proposed by the following subscribers to associate themselves into a corporation under the laws of Arizona for the purpose of acquiring a portion of the Oak Knoll, containing about twenty-one acres, and building thereon a first class hotel of about three hundred guest rooms, the total cost of which it is estimated to be about $600,000. A portion of this amount is to be provided for by an issue of first mortgage 5% bonds which will be sold at a price not less than 90 and accrued interest, the balance is to be provided for by the sale of stock. It is proposed to organize the Company with a capital stock of $350,000, divided into 3,500 shares of a par value of $100 each fully paid and non-assessable.

Referring to the foregoing, we, the undersigned, each for himself and not for others, hereby subscribe and agree to pay for the number of shares set opposite our respective names. This
10 subcription to be of force and effect immediately upon the whole amount of stock being subscribed and payments for same to be made in four equal installments, not less than sixty days apart, upon fifteen days' notice from the Treasurer."

That the words "Oak Knoll," used in said written instrument re-

ferred to and designated Oak Knoll situated near Pasadena, in the County of Los Angeles, State of California.

VI. That thereafter and prior to the times hereinafter mentioned, the said Wentworth Hotel Company complied with the laws of the State of California relating to foreign corporations doing business within that State by filing pursuant to §408 of the Civil Code of said State a certified copy of its Articles of Incorporation in the office of the Secretary of State of the State of California and a copy thereof in the County Clerk's Office of the County of Los Angeles, in said State, in which County is situated the City of Pasadena, herein referred to; by filing pursuant to §405 of the Civil Code of said State in the office of the Secretary of State of the State of California a designation of a person residing within that State upon whom process might be served and by paying pursuant to Chapter 380 of the Statutes of 1905 a State license tax; that it purchased land in said County of Los Angeles, near the City of Pasadena, and commenced the erection of a hotel thereon, and continued to do and transact business within the State of California until the 12th day of July, 1907, on which day said corporation was adjudged insolvent.

VII. That on or about the 5th day of October, 1906, at the City of Pasadena, in the State of California, the First National Bank of Pasadena, a National Banking Association, loaned to said
11 Wentworth Hotel Company the sum of Twenty-two thousand five — dollars ($22,500), and in consideration thereof, the said Wentworth Hotel Company made and delivered to said First National Bank of Pasadena its promissory note in writing, bearing date October 5th, 1906, whereby it promised, thirty days after said date, to pay to the order of said First National Bank of Pasadena, at its banking house, in the City of Pasadena, Twenty-two thousand five hundred dollars ($22,500) with interest until paid, at the rate of six per cent. per annum, payable monthly, together with a reasonable attorney's fee, to be fixed by the Court, if suit should be instituted on said note. That no part of the principal of said note has been paid and no part of said loan has been refunded, and no interest upon said note or upon said loan has been paid since the 4th day of February, 1907, though demanded therefor has been duly made. That before the beginning of this action, said note and the debt represented thereby was duly assigned to the plaintiff, who is now the owner and holder thereof, and that a reasonable attorney's fee for the institution of a suit thereon is the sum of One thousand one hundred and twenty-five dollars ($1,125).

VIII. That at the time said sum of Twenty-two thousand five hundred dollars ($22,500) was loaned by said First National Bank of Pasadena to the Wentworth Hotel Company, the whole of the subscribed capital stock or shares of said Wentworth Hotel Company was Three thousand one hundred and fifty (3,150) shares of the par value of Three hundred and fifteen thousand dollars ($315,000), and that the defendant owned one thousand (1,000) shares thereof of the par value of One hundred thousand dollars ($100,000).

IX. That upon said note of the Wentworth Hotel Company

there is now due and owing to the plaintiff from said Went-
12 worth Hotel Company the sum of Twenty-two thousand five hundred dollars ($22,500), with interest thereon from the 4th day of February, 1907, together with an attorney's fee of One thousand one hundred and twenty-five dollars ($1,125), and from the defendant, pursuant to the Constitution and Statutes of California and by reason of the facts herein set forth, the sum of Seven thousand five hundred dollars ($7,500), with interest thereon from the 4th day of February, 1907.

X. That on or about the 16th day of November, 1906, at the City of Pasadena, in the State of California, the Union Savings Bank of Pasadena, a California corporation, loaned to said Wentworth Hotel Company the sum of Twenty-five thousand dollars ($25,000) and in consideration thereof, the Wentworth Hotel Company made and delivered to said Union Savings Bank of Pasadena, its promissory note in writing, dated November 16th, 1906, whereby it promised, one day after said date, to pay to said Union Savings Banks of Pasadena, at its banking house in Pasadena, California, Twenty-five thousand dollars ($25,000), with interest until paid at the rate of six per cent. per annum, payable quarterly, and providing that if the interest be not so paid, it should become a part of the principal and thereafter bear like interest as the principal, and further agreeing to pay an additional sum of ten per cent. attorney's fees, if said not- should be placed in the hands of an attorney for collection, That no part of said loan has been repaid, and no part of the principal of said note has been paid, and no interest thereon has been paid since the 16th day of February, 1907, though demand therefor has been duly made. That before the beginning of this action, said note, and the debt represented thereby, was duly
13 assigned to the plaintiff who is now the owner and holder thereof.

XI. That at the time said sum of Twenty-five thousand dollars ($25,000) was loaned by said Union Savings Bank of Pasadena to the Wentworth Hotel Company, the whole of the subscribed capital stock or shares of said Wentworth Hotel Company was three thousand (3,000) shares of the par value of Three hundred thousand dollars ($300,000) of which the defendant owned one thousand (1,000) shares of the par value of One hundred thousand dollars ($100,000).

XII. That upon said note of the Wentworth Hotel Company to Union Savings Bank of Pasadena there is now due and owing to the plaintiff from the said Wentworth Hotel Company the sum of Twenty-five thousand dollars ($25,000) with interest from the 16th day of February, 1907, together with an attorney's fee of Two thousand five hundred dollars ($2,500), and from the defendant, pursuant to the Constitution and Statutes of California, and by reason of the facts herein set forth, the sum of Nine thousand one hundred sixty-six and 67/100 dollars ($9,166.67), with interest thereon from the 16th day of February, 1907.

Wherefore plaintiff demands judgment against the defendant for the sum of Sixteen thousand, six hundred sixty-six and 67/100 dol-

lars ($16,666.67), with interest upon Seventy-five hundred dollars ($7,500) from the 4th day of February, 1907, and interest upon Nine thousand one hundred sixty-six and 67/100 dollars ($9,166.67) from the 16th day of February, 1907, together with the costs of this action.

ROLLINS & ROLLINS,
Attorneys for Plaintiff.

No. 32 Nassau Street, Manhattan, New York City.

14 STATE OF NEW YORK,
County of New York, ss.:

JORDAN J. ROLLINS, being duly sworn, deposes and says:

That he is a member of the firm of Rollins & Rollins, the attorneys for the plaintiff herein.

That he has read the foregoing complaint and knows the contents thereof and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true. That the reason why this verification is not made by the plaintiff is that the plaintiff is not within the County of New York, where deponent resides and has his office.

That the sources of deponent's information and the grounds of his belief as to all matters not stated upon his own knowledge, are letters and copies of documents sent to the attorneys for the plaintiff by attorneys in Los Angeles, California, acting in behalf of the plaintiff.

JORDAN J. ROLLINS.

Sworn to before me this 20th day of April, 1908.
CHARLES F. HICKEY,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

(Endorsed:) United States Circuit Court, Southern District of New York.—Frank N. Thomas against Conrad H. Matthiessen.—Amended Complaint.—Rollins & Rollins, Attorneys for Plaintiff, No. 32 Nassau Street, New York.—Service of a copy of the within Amended Complaint admitted this 20th day of April, 1908.—Steele, Otis & Hall, Attorneys for Defendant.

15 Circuit Court of the United States for the Southern District of New York.

FRANK N. THOMAS, Plaintiff,
against
CONRAD H. MATTHIESSEN, Defendant.

The defendant above-named, by Steele, Otis & Hall, his attorneys, answering the amended complaint of the plaintiff herein:

I. Admits each and every allegation contained in paragraphs I and III of the complaint herein.

II. Admits and alleges that the articles of incorporation of the said Wentworth Hotel Company were in the form and contained the provisions set forth in a true copy of said articles of incorporation hereto annexed and marked Exhibit A and to which for a correct statement thereof reference is made.

III. Admits that prior to the incorporation of the said Wentworth Hotel Company the defendant subscribed a certain writing substantially in the form and words set worth in paragraph V of the complaint and that the words "Oak Knoll" used in said written instrument refer to and designate Oak Knoll situated near Pasadena in the County of Los Angeles, State of California, and that subsequent to the incorporation of the said Wentworth Hotel Company said Company issued to the defendant one thousand shares
16 of its capital stock, of the par value of $100,000, which amount the defendant thereupon duly and in good faith pail in full in cash to said Wentworth Hotel Company, and that the defendant was the owner of said one thousand shares of stock, a part of the subscribed stock of the said Wentworth Hotel Company, on the 5th day of October, 1906, and on the 16th day of November, 1906, but this defendant denies that by so executing the said writing referred to in paragraph V of the complaint prior to the incorporation of the said Wentworth Hotel Company this defendant subscribed to one thousand shares of the capital stock of said Company or any part thereof.

IV. Upon information and belief, admits and alleges that after the incorporation of said Wentworth Hotel Company and prior to the 5th day of October, 1906, said Wentworth Hotel Company duly filed, pursuant to Section 408 of the Civil Code of said State, a certified copy of its articles of incorporation, a copy of which is hereto annexed and marked Exhibit A as aforesaid, in the office of the Secretary of State of the State of California, and a certified copy thereof in the County Clerk's office in the County of Los Angeles, in said State, in which county is situated the City of Pasadena and in which are located the principal places of business of the First National Bank of Pasadena and of the Union Savings Bank of Pasadena mentioned in the complaint, and that it also prior to said dates and pursuant to Section 405 of the Civil Code of said State duly filed in the office of the Secretary of State of the State of California a designation of the person residing within that State upon whom process might be served, and that said copies of the certificate of incorporation upon such filing became public records in said State and in said County, and the said First National Bank of Pasadena and Union Savings Bank of Pasadena, mentioned
17 in the complaint, had upon such filing due notice thereof and of the provisions contained therein.

V. Denies the allegations contained in paragraph IX of the complaint that there is now due and owing to the plaintiff from the defendant, pursuant to the Constitution and Statutes of California and by reason of the facts set forth in the complaint or otherwise the sum of $7500, with interest from the 4th day of February, 1907, or any part thereof. And defendant further denies the allegations con-

tained in paragraph XII of the complaint that there is now due and owing to the plaintiff from the defendant, pursuant to the Constitution and Statutes of California and by reason of the facts set worth in the compiaint or otherwise, the sum of $9166.67, with interest from the 16th day of February, 1907, or any part thereof.

VI. Except as hereinbefore expressly admitted or denied this defendant denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations or any of them contained in paragraphs II, VI, VII, VIII, IX, X, XI and XII of the complaint.

And further answering said amended complaint and as an affirmative defense thereto, this defendant further alleges:

VII. That at all the times mentioned and referred to in said amended complaint this defendant was and now is a citizen of the State of New York and resided and now resides therein, as Irvington, in the County of Westchester.

VIII. That the Wentworth Hotel Company referred to in the amended complaint is a corporation organized on the 12th day of April, 1906, under and pursuant to the laws of the State
18 of Arizona and that annexed hereto and marked Exhibit A is a true copy of the certificate of incorporation of the said Wentworth Hotel Company, which is hereby made a part of this answer as though here inserted at length.

IX. That subsequent to the incorporation of the said Wentworth Hotel Company this defendant subscribed to one thousand shares of the capital stock of the said Wentworth Hotel Company at the par value of $100,000 and subsequently in good faith paid in cash to said Wentworth Hotel Company said sum of $100,000, the full amount of his subscription therefor, and received a certificate from said corporation certifying his ownership of the said shares.

X. That at the time of the defendant's subscription to the capital stock of said Wentworth Hotel Company and of his payment of the amount thereof, and receipt of the certificate of stock above mentioned, the defendant agreed with the said Wentworth Hotel Company and the incorporators and stockholders thereof that the capital stock so issued to this defendant by said Company should be forever non-assessable by said corporation for any purpose and that this defendant and his property should be exempt from all liability for its debts or obligations, and that neither said corporation nor its officers or agents should have power to subject this defendant or the other stockholders of said corporation to any personal liability for any debts or obligations of said company; that at said times and at the time of the organization of said Company and upon the 5th day of October, 1906, and the 16th day of November, 1906, and long subsequent thereto this defendant had no knowledge or notice and was ignorant that any provisions of the Constitution or Laws
19 of the State of California imposed or purported to impose any personal liability upon stockholders of foreign corporations doing business in the State of California to creditors thereof, but on the contrary was advised and verily believed that as a result of his subscribing to and receiving stock in the said Wentworth Hotel

Company paid for by him as aforesaid he would assume no personal liability to any creditors of said corporation upon any obligations it might thereafter incur, and upon the faith of such belief and advice and in reliance upon his agreement with the said corporation and the incorporators and stockholders thereof and upon the provisions of the said certificate of incorporation and of the Laws of Arizona, this defendant subscribed and paid for said capital stock as aforesaid.

XI. Upon information and belief that duly certified copies of the certificate of incorporation of said Wentworth Hotel Company, a true copy of which is hereto annexed and marked Exhibit A, were subsequent to the incorporation of said corporation and prior to the 5th day of October, 1906, duly filed in compliance with the Laws of the State of California in the office of the Secretary of State of the said State of California and in the county clerk's office of the County of Los Angeles, in said State, in which County was and is situated the City of Pasadena and in which County were on said 5th day of October and at all times since have been located the principal places of business of the First National Bank of Pasadena and the Union Savings Bank of Pasadena mentioned in the complaint. And that at all times since said filing and since on or about said 5th day of October, 1906, said First National Bank of Pasadena and said Union Savings Bank of Pasadena and each of them had full notice of the provisions of said certificate of incorporation, and that under the laws pursuant to which said Wentworth Hotel Company was incorporated and by virtue of the agreement of the incorporators and stockholders thereof said stockholders and this defendant were not subject and could not be subjected to any personal liability for any debts or liabilities of the said corporation or to any creditors thereof.

Wherefore this defendant demands that the amended complaint of the plaintiff be dismissed on the merits, with costs.

STEELE, OTIS & HALL,
Attorneys for Defendant.

Office and P. O. Address, 25 Broad Street, Borough of Manhattan, New York City.

STATE OF NEW YORK,
County of New York, ss:

Conrad H. Matthiessen, being duly sworn, deposes and says: That he is the defendant above named; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

C. H. MATTHIESSEN.

Sworn to before me this 13th day of May, 1908.

CHAS. W. MILLARD,
Notary Public, New York Co.

[SEAL.]

Cert. Filed in Kings Co.

21 EXHIBIT A.

TERRITORY OF ARIZONA,
OFFICE OF THE TERRITORIAL AUDITOR.

UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, John H. Page, Territorial Auditor of the Territory of Arizona, do hereby certify, that on the 12th day of April, A. D. 1906, at 1 o'clock p. m., the Articles of Incorporation of the Wentworth Hotel Company, organized under the laws of the Territory of Arizona, were filed in this office.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal. Done at the City of Phoenix, the Capital, this 12th day of April, A. D. 1906.

(Signed) JOHN H. PAGE,
[SEAL.] *Territorial Auditor.*

Articles of Incorporation of the Wentworth Hotel Company.

Know all men by these presents:

That we, whose names are hereunto affixed, do hereby, associate ourselves together for the purpose of forming a corporation under the laws of the Territory of Arizona, and to that end adopt the following Articles of Incorporation:

I.

The names of the incorporators are, M. C. Wentworth, E. L. Bean, W. R. Staats, F. A. Warner and D. P. Hatch; and the name
22 of the corporation shall be the Wentworth Hotel Company.

The principal place in which the business of said corporation, within the Territory of Arizona, is to be transacted, is Tucson, Pima County, Territory of Arizona, and the principal place of said corporation outside of the Territory of Arizona shall be in the City of Los Angeles, in the State of California, with the power in the Board of Directors to change the principal place of business of said corporation, outside of the Territory of Arizona, from the City of Los Angeles to the City of Pasadena, if in their judgment they should so elect, at which place, when so elected, meetings of stockholders and of the Board of Directors may be held, and the corporation may have such branch offices, either within or without the Territory of Arizona as may be established by its Board of Directors.

II.

The general nature of the business to be transacted by this corporation is as follows:

(*a*) To buy, own, lease, sell and otherwise acquire real property, anywhere that its Board of Directors may elect; to build, maintain, operate and carry on, in all its branches, the business of hotel keep-

ing and all that is incidental or necessary for the full and complete carrying out of all the purposes and objects that could possibly come within the scope of its business.

(*b*) To build, repair, maintain, acquire by purchase or otherwise, and operate, gas or electric works, of all kinds and descriptions, in the Territory of Arizona or the State of California, or elsewhere that may be determined by its Board of Directors, both for its own use in the hotel business and for the purpose of selling and disposing of the same, to whomsoever may desire to purchase, when it has any
23 more than is necessary for its own purposes.

(*c*) To hold, purchase or otherwise acquire, to sell, assign, transfer, mortgage, pledge or otherwise dispose of, shares of the capital stock, bonds or other evidence of indebtedness created by any other corporation or corporations, and while the holder of such stock to exercise all the rights and privileges of ownership, including the right to vote thereon to the same extent as a natural person might or could do.

(*d*) To build, repair, maintain, acquire, by purchase or otherwise, and to operate all waterworks, mains, pipes, dams, reservoirs, streams, and to take up and appropriate the same under the laws of the Territory of Arizona, or of any State, Territory or colony of the United States, and in all foreign countries and places.

(*e*) To purchase, lease, exchange, hire, or otherwise acquire any or all rights, privileges, pursuits or franchises suitable or convenient for any of the purposes hereinbefore or hereinafter mentioned or specified.

(*f*) To locate townsites and to buy, sell, or in any wise hypothecate townsites and town lots, and to let out townsites, and to dedicate streets, parks and alleys in the same, and to buy, sell and locate water-rights, flumes, pipes, lines and all other conveniences for conducting water, irrigating canals, rights of way and easements for the same, and to buy and sell water for power and domestic use, or any other purpose whatsoever.

(*g*) To borrow money and to incumber the corporate property as security for the payment thereof, and to execute bonds, debentures, bills, promissory notes and mortgages for the purpose of
24 borrowing money to carry out the objects and purposes for which this corporation is formed.

III.

The amount of capital stock of this corporation shall be Three hundred and fifty thousand dollars ($350,000.00), divided into thirty-five hundred shares (3,500) of one hundred dollars ($100.00) each. At such time as the Board of Directors may by resolution direct, said capital stock shall be paid into this corporation, either in cash or by the sale and transfer to it of real or personal property, or stock of other corporations, for the uses and purposes of said corporation in payment for which shares of the capital stock of said corporation may be issued, and the capital stock so issued shall thereupon and thereby become and be fully paid-up and non-assessable,

and in the absence of actual fraud in the transaction, the judgment of the Directors as to the value of the property stock or thing purchased shall be conclusive.

IV.

The time of the commencement of this corporation shall be the date of the filing of these Articles of Incorporation in the office of the Auditor of Arizona, and the determination thereof shall be twenty-five (25) years thereafter.

V.

The affairs of this corporation shall be directed by a Board of five Directors, who shall be elected annually by the stockholders, and on the first Tuesday of April of each year, to serve for a term of one (1) year and until their successors are duly elected and qualified. Until the first regular election, on the first Tuesday of April, 1907, the following named persons, who constitute the first subscribers of the capital stock of this corporation, shall constitute the Board of Directors:

M. C. Wentworth,
E. L. Bean,
W. R. Staats,
F. A. Warner,
D. P. Hatch.

VI.

No person shall be eligible to the office of Director of this corporation unless he is a stockholder in the corporation at the date of his election, and a director ceasing to be a stockholder shall thereupon cease to be a director.

VII.

All vacancies on the Board of Directors shall be filled by the remaining directors of the Board of Directors. The Board of Directors of this corporation may elect such officers and appoint such committee, or committees, and such business manager, or managers, to aid in the management of the business of this corporation, as they may deem expedient, and vest in such managers, officers or committees such powers as the Board of Directors may deem best.

VIII.

As soon as practicable after the filing of these Articles of Incorporation in the office of the County Recorder of Pima County, Territory of Arizona, the persons hereinbefore named as directors shall meet and adopt By-laws, that at regularly appointed meetings of the Board of Directors they may make such rules and regulations as they may deem necessary for the management of this corporation and its affairs, consistent with these Articles of Incorporation and in accordance with the laws of the United States and the laws of the Territory of Arizona.

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IX.

These Articles of Incorporation may be amended at any annual meeting of the stockholders, or at any special meeting thereof called for the purpose, by a majority vote of all the stock issued in favor of such proposed amendment, and when any amendment of these Articles of Incorporation shall be made, the same shall be signed and acknowledged by the President of the corporation, and shall have the same force and effect as those signed by all subscribers.

X.

The highest amount of indebtedness or liability to which the corporation is at any time to subject itself, is not to exceed five hundred thousand dollars ($500,000).

XI.

The capital stock of this corporation shall be and is hereby made forever non-assessable by this corporation for any purpose.

XII.

The private property of the stockholders of this corporation shall be and is hereby made forever exempt from all liability for its debts or obligations.

In witness whereof, we, the aforesaid incorporators, have hereunto set our hands and seals this 9th day of April, 1906.

(Signed) M. C. WENTWORTH. [SEAL.]
E. L. BEAN. [SEAL.]
WILLIAM R. STAATS, [SEAL.]
F. A. WARNER. [SEAL.]
D. P. HATCH. [SEAL.]

27 STATE OF CALIFORNIA,
County of Los Angeles, ss:

Before me, Lizzie D. Brett, a Notary Public in and for said County and State, on this day personally appeared M. C. Wentworth, E. L. Bean, W. R. Staats, F. A. Warner and D. P. Hatch, known to me to be the persons described in and whose name- are subscribed to and who executed the annexed instrument, and they acknowledged to me that they executed the same, for the purposes and considerations therein expressed.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said County and State, the 9th day of April in the year last above written.

My commission expires November 11, 1909.

(Signed) LIZZIE D. BRETT,
Notary Public in and for the County of Los Angeles, State of California.

(Endorsed:) Circuit Court of the United States, Southern District of New York.—Frank N. Thomas, Pl'ff, vs. Conrad H. Matthiessen, Def't.—Answer.—Steele, Otis & Hall, Attorneys for Defendant, 25 Broad Street, Broad Exchange Building, New York City.—Copy of within paper received May 13, 1908. Rollins & Rollins.—U. S. Circuit Court, Southern District N. Y.—Filed May 13, 1908.—John A. Shields, Clerk.

28 At a Stated Term of the United States Circuit Court for the Southern District of New York, Held in the Post-Office Building, in the Borough of Manhattan, City of New York, on the 13th Day of May, 1910.

Present: Hon. E. Henry Lacombe, United States Circuit Judge.

FRANK N. THOMAS, Plaintiff,
against
CONRAD H. MATTHIESSEN, Defendant.

Upon the annexed consent of the attorneys for the parties hereto respectively and upon reading the annexed copy of the proposed supplemental answer of the defendant, and upon all the pleadings and proceedings herein, it is

Ordered that the defendant above-named and his attorney have leave, and leave is hereby given to him and them, to make, serve and file this day the supplemental answer in the above-entitled action, a copy of which is hereto annexed, in addition to the answer already served and without prejudice to the pleadings already served herein or to the ruling of this Court sustaining the plaintiff's demurrer to the affirmative defenses contained in the defendant's first answer to the amended complaint.

Enter.

E. HENRY LACOMBE, *Judge.*

29 The parties hereto by their respective attorneys of record hereby consent and agree that the foregoing order be forthwith signed and that the same may be entered by either party without notice.

Dated New York City, May 13th, 1910.

ROLLINS & ROLLINS,
Attorneys for Plaintiff.
STEELE, OTIS & HALL,
Attorneys for Defendant.

Circuit Court of the United States for the Southern District of New York.

FRANK N. THOMAS, Plaintiff,
against
CONRAD H. MATTHIESSEN, Defendant.

Supplemental Answer.

The defendant above-named by Steele, Otis & Hall, his attorneys, pursuant to order of this Court, makes and files this, his supplemental answer to the amended complaint of the plaintiff herein in addition to his first answer served on May 13th, 1908, and alleges the following further facts as a second and additional affirmative defense to said amended complaint; said facts having been unknown to the defendant or his attorneys at the time of the making, serving and filing of the defendant's first answer herein to the amended
30 complaint of the plaintiff and until on or about the first day of May, 1910:—

Twelfth. Upon information and belief, that on and after the date of maturity of the note mentioned in the complaint executed by the Wentworth Hotel Company to the First National Bank of Pasadena and until on or about the 31st day of January, 1907, the principal of said note, together with interest thereon, was the only debt of the Wentworth Hotel Company to said First National Bank of Pasadena, and during said period said First National Bank of Pasadena in the ordinary course of business from time to time held cash on deposit to the credit of the Wentworth Company to an amount more than sufficient to pay said note with interest and prior to its assignment of said note paid out said sums to or upon the order of the Wentworth Hotel Company without applying said sums to the payment of said note or previously obtaining, accepting or securing payment of said note *of* any part thereof by set-off or otherwise, and without notice to or the assent of the defendant.

Thirteenth. Upon information and belief, that on and after the date of maturity of the note mentioned in the complaint executed by the Wentworth Hotel Company to the Union Savings Bank of Pasadena and until on or about the 31st day of January, 1907, the principal of said note, together with interest thereon, was the only debt of the Wentworth Hotel Company to said Union Savings Bank of Pasadena, and during said period said Union Savings Bank of Pasadena in the ordinary course of business from time to time held cash on deposit to the credit of the Wentworth Hotel Company to an amount more than sufficient to pay said note with interest, and prior to its assignment of said note paid out said sums to or
31 upon the order of the Wentworth Hotel Company without applying said sums to the payment of said note or previously obtaining, accepting or securing payment of said note or any part thereof by set-off or otherwise, and without notice to or the assent of the defendant.

Fourteenth. Upon information and belief, that after the 31st day of January, 1907, and before the twenty-fourth day of May, 1907, each of the above-mentioned notes was duly assigned to the plaintiff, without consideration, who has ever since held and now holds the same for the benefit of the said banks respectively.

Fifteenth. Upon information and belief, that after the 31st day of January, 1907, and after the assignment to the plaintiff of the notes mentioned in the complaint and prior to the 24th day of May, 1907, the plaintiff duly commenced action against the Wentworth Hotel Company in the Superior Court of the State of California in and for the County of Los Angeles to recover the principal and interest due upon each of said notes.

Sixteenth. Upon information and belief, that at the time of the commencement of said action the property of the Wentworth Hotel Company was of great value, being in excess of Four hundred and fifty thousand dollars ($450,000), and at the same time the aggregate amount of all debts of the Wentworth Hotel Company which were secured by said property or any part thereof, or upon which suit had already been commenced, did not exceed the sum of Two hundred and seventy-five thousand dollars ($275,000). At the same time there were outstanding in addition Two hundred and seventy-five thousand dollars ($275,000) face value of bonds purporting to be obligations of the Wentworth Hotel Company and purporting
32 to be secured by said Company's property under a trust deed duly recorded, which bonds were invalid; but the fact that they were invalid was not known to the plaintiff or his assignors until after the commencement of this action.

Seventeenth. Upon information and belief, that an involuntary petition in insolvency was filed against the Wentworth Hotel Company by certain creditors of said company on the 24th day of May, 1907, in the Superior Court of the State of California, in and for the County of Los Angeles. That subsequently, to wit: On the 12th day of July, 1907, the said Wentworth Hotel Company was duly adjudged an insolvent and that upon the 25th day of July, 1907, Henry S. McKee was duly elected as Assignee in insolvency of said Wentworth Hotel Company. That said Henry S. McKee duly qualified as Assignee and gave bond in the sum of One hundred thousand dollars ($100,000), which said bond was approved on the 25th day of July, 1907, and that the said Henry S. McKee has ever since been and is now the duly qualified and acting Assignee in insolvency of the said Wentworth Hotel Company. That on the 26th day of July, 1907, the clerk of the above-entitled Court by an instrument under his hand and seal of the Court, assigned and conveyed to the Assignee all of the estate, real and personal, of the debtor, and said assignment was recorded by the Assignee in the Recorder's office of Los Angeles County on the 26th day of July, 1907, in Book 3,140, Page 86 of Deeds, Los Angeles County Records.

Eighteenth. Upon information and belief, that during the pendency of said action by the plaintiff against the Wentworth Hotel Company and subsequent to the 26th day of July, 1907, the
33 plaintiff duly proved and filed his claim against Henry S. McKee, assignee in insolvency of the Wentworth Hotel Company, for the principal and interest due upon each of said notes.

Nineteenth. That by reason of the facts aforesaid, the Wentworth Hotel Company has failed to make payment respectively of said notes, if at all, because of the unreasonable and unlawful neglect and refusal of said First National Bank of Pasadena and of said Union Savings Bank of Pasadena, respectively, to accept payment of said notes respectively, after maturity thereof and prior to January 31st, 1907, during which period said Wentworth Hotel Company frequently tendered payment of said notes respectively, together with interest thereon, to said First National Bank of Pasadena and said Union Savings Bank of Pasadena, respectively, as aforesaid, and also because of the plaintiff's waiver and abandonment of his said action against the Wentworth Hotel Company by making and filing his claim as aforesaid against the assignee in insolvency of said Company.

Wherefore the defendant demands that the amended complaint of the plaintiff be dismissed upon the merits with costs.

STEELE, OTIS & HALL,
Attorneys for Defendant.

Office & Post Office Address, No. 25 Broad Street, Borough of Manhattan, City of New York.

STATE OF NEW YORK,
County of New York, ss:

Harold Otis, being duly sworn, deposes and says: That he is an attorney at law employed in the office of Steele & Otis, for-
34 merly Steele, Otis & Hall, the attorneys for the defendant herein; that he has read the foregoing supplemental answer and knows the contents thereof; and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. That the reason why this verification is not made by the defendant is that the defendant is not within the County of Kings or County of New York, in which counties respectively the deponent resides and has his office. That the source of deponent's information and the grounds of his belief as to all matters not stated upon his own knowledge are letters and copies of documents sent to the attorneys for the defendant by the attorneys for the plaintiff and by attorneys in Los Angeles acting in behalf of the defendant.

HAROLD OTIS.

Sworn to before me this 13th day of May, 1910.

[SEAL.] CHAS. W. MILLARD,
Notary Public, New York Co.

Cert. Filed in Kings Co.

[Endorsed:] United States Circuit Court, Southern District of New York. Frank N. Thomas, Plaintiff, against Conrad H. Matthiessen, Defendant. Order & Consent. Steele, Otis & Hall, Attorneys for Defendant, 25 Broad Street, New York City. U. S. Circuit Court, Southern District, N. Y. Filed May 13, 1910. John A. Shields, Clerk.

35 At a Stated Term of the United States Circuit Court, for the Southern District of New York, Held in the Post Office Building, in the Borough of Manhattan, City of New York, on the 19th Day of May, 1910.

Present: Hon. E. Henry Lacombe, United States Circuit Judge.

FRANK N. THOMAS, Plaintiff,
against
CONRAD H. MATTHIESSEN, Defendant.

On reading and filing the annexed consent of Steele, Otis & Hall, and of Conrad H. Matthiessen, and on motion of Steele & Otis for Conrad H. Matthiessen, it is

Ordered that Steele & Otis, of 25 Broad Street, Manhattan, New York City, be and they are hereby substituted as the attorneys of the defendant in the above-entitled cause in place of Steele, Otis & Hall.

Enter.

E. HENRY LACOMBE,
U. S. C. J.

36 United States Circuit Court, Southern District of New York.

FRANK N. THOMAS, Plaintiff,
against
CONRAD H. MATTHIESSEN, Defendant.

We hereby consent that Steele & Otis of No. 25 Broad Street in the Borough of Manhattan, City of New York, be substituted in the place of Steele, Otis & Hall, as attorneys for the defendant in this action and that an order of substitution may be entered forthwith and without notice.

Dated May 16th, 1910.

CONRAD H. MATTHIESSEN,
Defendant.

STEELE, OTIS & HALL,
Attorneys.

STATE OF NEW YORK,
County of New York, ss:

On this 16th day of May, 1910, before me personally came Conrad H. Matthiessen, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

[SEAL.] CHAS. W. MILLARD.

[Endorsed:] United States Circuit Court, Southern District of New York. Frank N. Thomas, Plaintiff, against Conrad H. Matthiessen, Defendant. Order of Substitution and Consent. Steele & Otis, Attorneys for Defendant, 25 Broad Street, New York City. U. S. Circuit Court, Southern District, N. Y. Filed May 20, 1910. John A. Shields, Clerk.

37 Circuit Court of the United States, Southern District of New York.

FRANK H. THOMAS, Plaintiff,
against
CONRAD H. MATTHIESSEN, Defendant.

Stipulation.

The parties hereto by their respective attorneys of record hereby consent and agree that, for the purpose of the trial of the above-entitled action, the following are true statements of facts and are to be deemed evidence in this action:

I. That the plaintiff is and was at all times herein mentioned a citizen and resident of the State of California, residing therein, in the City of Pasadena, and the defendant is and was at all times herein mentioned a citizen and resident of the State of New York, residing therein at Irvington, County of Westchester.

II. That the Wentworth Hotel Company is a corporation organized on the 12th day of April, 1906, under and pursuant to the laws of the Territory (now State) of Arizona, and that annexed to the answer herein as a part thereof and marked "Exhibit A" is a true copy of the certificate of incorporation of the said Wentworth Hotel Company. That the words "City of Pasadena" used in said Articles of Incorporation, referred to and designated the City of Pasadena, located within the State of California.

38 III. That prior to the incorporation of the said Wentworth Hotel Company the defendant subscribed a certain writing substantially as follows:

"It is proposed by the following subscribers to associate themselves into a Corporation under the laws of Arizona for the purpose of acquiring a portion of the Oak Knoll, containing about twenty-one acres, and building thereon a first-class hotel of about three hundred guest rooms, the total cost of which it is estimated to be about $600,000. A portion of this amount is to be provided by an issue of first mortgage 5% bonds which will be sold at a price not less than 90 and accrued interest, the balance is to be provided for by the sale of stock. It is proposed to organize the Company with a capital stock of $350,000, divided into 3,500 shares of a par value of $100 each, fully paid and non-assessable.

Referring to the foregoing, we, the undersigned, each for himself and not for others, hereby subscribe and agree to pay for the number of shares set opposite our respective names. This subscription to be of force and effect immediately upon the whole amount of stock being subscribed and payments for same to be made in four equal installments, not less than sixty days apart, upon fifteen days' notice from the Treasurer."

That the word "Oak Knoll" used in said writing referred to and designated Oak Knoll, situated near Pasadena, in the County of Los Angeles, State of California.

IV. That subsequent to the incorporation of the said Wentworth Hotel Company the defendant subscribed to one thousand shares of the capital stock of the said Wentworth Hotel Company
39 at the par value of $100,000 and subsequently in good faith paid in cash to said Wentworth Hotel Company said sum of $100,000, the full amount of his subscription therefor, and received a certificate from said corporation certifying his ownership of the said shares, and that the defendant was the owner of said one thousand shares of stock, a part of the subscribed stock of the said Wentworth Hotel Company, on the 5th day of October, 1906, and on the 16th day of November, 1906.

That at the time the defendant subscribed for said stock it was the purpose and intent of himself and of the other subscribers for stock in said Wentworth Hotel Company that said company should have the power, among others, to erect a hotel and engage in the hotel business near the City of Pasadena, in the State of California, and that it would probably erect such a hotel and engage in such business, but it was the purpose and intent of such subscribers that their obligations as such and as stockholders in said company should be controlled and determined by the articles of incorporation of said Company and by the laws of Arizona.

V. That at the time of the defendant's subscription to the capital stock of said Wentworth Hotel Company and of his payment of the amount thereof and receipt of the certificate of stock above mentioned the defendant agreed with the said Wentworth Hotel Company and the incorporators and stockholders thereof that the capital stock so issued to the defendant by said company should be forever non-assessable by said corporation for any purpose and that the defendant and his property should be exempt from all liability for its debts or obligations, and that neither said corporation or its officers or agents should have power to subject the defendant or the other stockholders of said corporation to
40 any personal liability for any debts or obligations of said Company; that at said times and at the times of the organization of said Company and upon the 5th day of October, 1906, and the 16th day of November, 1906, and long subsequent thereto the defendant had no knowledge or notice and was ignorant that any provisions of the Constitution or Laws of the State of California imposed or purported to impose any personal liability upon stockholders of foreign corporations doing business in the State of California to creditors thereof, but on the contrary was advised and verily believed that as a result of his subscribing to and receiving stock in the said Wentworth Hotel Company paid for by him as aforesaid he would assume no personal liability to any creditors of said corporation upon any obligation it might thereafter incur, and upon the faith of such belief and advice and in reliance upon his agreement with the said corporation and the incorporators and stockholders thereof and upon the provisions of the said certificate of incorporation and of the Laws of Arizona the defendant subscribed and paid for said capital stock as aforesaid.

VI. That after the incorporation of said Wentworth Hotel Com-

pany, and prior to the 5th day of October, 1906, said Wentworth Hotel Company duly filed, pursuant to Section 408 of the Civil Code of said State, a certified copy of its articles of incorporation, a copy of which is annexed to the answer herein and marked "Exhibit A," as aforesaid, in the office of the Secretary of State of the State of California, and a certified copy thereof in the County Clerk's Office, in the County of Los Angeles in said State, in which County is situated the City of Pasadena, and in which are located the principal places of business of the First National Bank of Pasadena, and of the Union Savings Bank of Pasadena hereinafter mentioned; and that it also, prior to said date, and pursuant to Section 405 of the Civil Code of said State, duly filed in the office of the Secretary of State of the State of California a designation of a person residing within that State upon whom process might be served, and paid, pursuant to Chapter 380 of the Statutes of 1905, a State license tax; and said copies of said certificate of incorporation, upon such filing, became public records in said State and County. And that at all times since said filing, the plaintiff and said First National Bank of Pasadena and said Union Savings Bank of Pasadena and each of them had full notice of the provisions of said certificate of incorporation, and that under the laws pursuant to which said Wentworth Hotel Company was incorporated and by virtue of the Agreement of the incorporators and stockholders thereof said stockholders and this defendant were not subject and could not be subjected to any personal liability for any debts or liabilities of the said corporation or to any creditors thereof. After said filing, said Wentworth Hotel Company purchased land in said County of Los Angeles, near the City of Pasadena, and erected a hotel thereon, and transacted business within the State of California until the 12th day of July, 1907, on which day said corporation was duly adjudged insolvent as hereinafter set forth.

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VII. That an involuntary petition in insolvency was filed against the Wentworth Hotel Company by certain creditors of said Company on the 24th day of May, 1907, in the Superior Court of the State of California, in and for the County of Los Angeles. That subsequently, to wit: On the 12th day of July, 1907, the said Wentworth Hotel Company was duly adjudged an insolvent and that upon the 25th day of July, 1907, Henry S. McKee was duly elected as Assignee in insolvency of said Wentworth Hotel Company. That said Henry S. McKee duly qualified as Assignee and gave bond in the sum of One Hundred Thousand Dollars ($100,000.00), which said bond was approved on the 25th day of July, 1907, and that the said Henry S. McKee has ever since been and is now the duly qualified and acting Assignee in insolvency of the said Wentworth Hotel Company. That on the 26th day of July, 1907, the clerk of the above-entitled Court by an instrument under his hand and seal of the Court, assigned and conveyed to the Assignee all of the estate real and personal of the debtor, and said assignment was recorded by the Assignee in Recorder's Office of

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Los Angeles County on the 26th day of July, 1907, in Book 3140, page 86, of Deeds, Los Angeles County Records.

VIII. That on or about the 5th day of October, 1906, at the City of Pasadena, in the State of California, the First National Bank of Pasadena, a National Banking Association, loaned to the said Wentworth Hotel Company the sum of Twenty-two thousand Five hundred Dollars ($22,500), and in consideration thereof the said Wentworth Hotel Company made and delivered to said First National Bank of Pasadena its promissory note in writing, as follows:

$22,500.00. PASADENA, CALIFORNIA, *October 5th*, 1906.

Thirty days after date for value received, we jointly and severally promise to pay to the order of The First National Bank of Pasadena, at its banking house in the City of Pasadena, Twenty-two thousand five hundred Dollars with interest, from date until paid, at the rate of six per cent. per annum, payable monthly, and a reasonable attorney's fee, to be fixed by the Court, if suit be instituted on this note. Principal and interest payable in Gold Coin of the
43 United States.

No. 24194. Nov. 4, 1906.

WENTWORTH HOTEL COMPANY.
M. C. WENTWORTH, *Pres.*
[SEAL.] E. L. BEAN, *Sect.*"

P. O. Address, —.

IX. That no part of the principal of said note has been paid and no interest thereon has been paid since the fourth day of February, 1907, though demand therefor has been duly made.

X. That on or about the 16th day of November, 1906, at the City of Pasadena, in the State of California, the Union Savings Bank of Pasadena, a California corporation, loaned to said Wentworth Hotel Company the sum of Twenty-five thousand dollars ($25,000), and in consideration thereof the Wentworth Hotel Company made and delivered to said Union Savings Bank of Pasadena its promissory note in writing, as follows:

"$25,000.00. PASADENA, CAL., *Nov.* 16, 1906.

No. 2124B one day after date, for value received, The Wentworth Hotel Co. promises to pay to Union Savings Bank of Pasadena, Cal., or order, at its banking house in Pasadena, California, twenty-five thousand dollars, with interest from date until paid, at the rate of 6 per cent. per annum, payable quarterly, and if not so paid, the interest shall become a part of the principal and thereafter bear like interest as the principal. Should this note be placed in the hands of an attorney for collection we agree to pay an additional sum of ten

per cent. on principal as attorney's fees. Principal and interest payable in Gold Coin of the United States.

Address

[SEAL.] THE WENTWORTH HOTEL COMPANY,

Address

By M. C. WENTWORTH,
Its President;

Address

By E. L. BEAN,
Its Secretary."

XI. That no part of the principal of said note has been paid and no interest thereon has been paid since the 16th day of February, 1907, though demand therefor has been duly made.

XII. That at the times when the two notes above mentioned were respectively made and delivered by the Wentworth Hotel Company, and the two sums of money were respectively loaned as aforesaid, the whole of the subscribed capital stock or shares of said Wentworth Hotel Company was three thousand five hundred (3,500) shares of the par value of Three hundred and Fifty thousand dollars ($350,000) of which the defendant owned One thousand (1,000) shares of the par value of One hundred thousand dollars ($100,000).

XIII. That after the thirty-first day of January, 1907, and before the twenty-fourth day of May, 1907, each of the above mentioned notes was duly assigned to the plaintiff without consideration, who has ever since held and now holds the same for the benefit of said banks respectively.

XIV. That on or after the date of maturity of the note mentioned in the complaint executed by the Wentworth Hotel Company to the First National Bank of Pasadena and until on or about the 31st day of January, 1907, the principal of said note together with interest thereon was the only debt of the Wentworth Hotel Company
45 to said First National Bank of Pasadena, and during said period said First National Bank of Pasadena in the ordinary course of business, held cash on deposit to the credit of the Wentworth Hotel Company in the following amounts on the following days respectively, namely:

1906.		1906.	
Nov. 4-5-6.....	$28,000.22	Nov. 7.....	$40,500.22
8.....	25,558.99	9.....	25,460.39
10.....	23,370.80	11.....	23,197.70
12.....	15,721.25	13.....	13,702.10
14.....	11,935.61	15.....	10,410.01
16-17-18.....	9,823.23	19.....	2,903.25
20.....	2,743.25	21-2-3-4-5....	1,559.55
26.....	1,523.80	27.....	1,466.80
28.....	1,386.80	29-30.....	731.21
Dec. 1-2.....	731.21	Dec. 7.....	2,028.08
13-14-15-16...	1,392.62	17.....	6,076.98
18.....	5,178.73	19.....	4,857.58

20	3,147.73	21	18,226.76
22-23	5,047.83	24-25	4,612.43
26	2,790.88	27	8,540.88
28	7,977.34	29-30	8,352.89
31	5,233.14		

1907.		1907.	
Jan. 3	1,303.49	Jan. 1-2	1,757.34
5-6	12,965.69	4	5,845.99
8	23,150.21	7	15,455.52
10	18,870.19	9	19,410.19
12	17,343.67	11	18,484.47
15	16,589.22	13-14	20,790.97
17	29,600.33	16	31,944.22
19-20	27,135.66	18	32,406.95
22	15,623.21	21	24,964.11
24	13,474.79	23	13,570.24
26-27	10,204.29	25	12,132.34
29	6,172.73	28	5,369.26
31	5,907.97	30	5,946.97

46 And said First National Bank of Pasadena from time to time after said dates respectively, and before its assignment of said note, paid out said sums to or upon the order of the Wentworth Hotel Company without applying the same to the payment of said note or previously obtaining, accepting or securing payment of said note or any part thereof by set-off or otherwise and without notice to or the assent of the defendant.

XV. That on and after the date of maturity of the note mentioned in the complaint executed by the Wentworth Hotel Company to the Union Savings Bank of Pasadena and until on or about the 31st day of January, 1907, the principal of said note together with interest thereon was the only debt of the Wentworth Hotel Company to said Union Savings Bank of Pasadena and during said period said Union Savings Bank of Pasadena in the ordinary course of business held cash on deposit to the credit of the Wentworth Hotel Company in the following amounts on the following days respectively, namely:

1906.		1906.	
Nov. 17	$10,545.09	Dec. 5	$5,358.84
Dec. 7	13,546.34	14	13,152.28
15	8,112.53	20	10,442.80
21	8,419.00	22	17,356.50
24	16,623.85	26	11,021.45
27	6,625.88	28	6,340.88
29	12,546.88	31	12,941.58

1907.		1907.	
Jan. 2	8,487.37	Jan. 3	8,101.87
4	11,063.21	5	9,052.21
7	20,741.46	8	18,326.26
9	7,057.59	10	6,521.59

	11.....	12,525.59		12.....	10,900.59
	14.....	8,846.59		15.....	13,924.64
47					
Jan.	16.....	13,504.64	Jan.	17.....	24,954.89
	19.....	20,996.27		21.....	18,555.67
	22.....	15,555.67		23.....	11,143.52
	24.....	12,415.92		25.....	11,322.63
	26.....	6,984.74		28.....	2,618.87
	29.....	1,958.07		30.....	9,695.87
	31.....	9,673.57			

And said Union Savings Bank of Pasadena from time to time after said dates respectively and before its assignment of said note paid out said sums to or upon the order of the Wentworth Hotel Company without applying the same to the payment of said note or previously obtaining, accepting or securing payment of said note or any part thereof by set-off or otherwise and without notice to or the assent of the defendant.

XVI. That after the 31st day of January, 1907, and after the assignment to the plaintiff of the notes mentioned in the complaint and prior to the 24th day of May, 1907, the plaintiff duly commenced action against the Wentworth Hotel Company in the Superior Court of the State of California, in and for the County of Los Angeles, to recover the principal and interest due upon each of said notes.

XVII. That at the time of the commencement of said action the property of the Wentworth Hotel Company was of great value, being in excess of Four hundred and Fifty thousand Dollars ($450,000), and at the same time the aggregate amount of all debts of the Wentworth Hotel Company which were secured by said property or any part thereof, or upon which suit had already been commenced, did not exceed the sum of Two hundred and Seventy-five thousand Dollars ($275,000). At the same time there were
48 outstanding in addition Two hundred and Seventy-five thousand Dollars ($275,000) face value of bonds purporting to be obligations of the Wentworth Hotel Company and purporting to be secured by said Company's property under a trust deed duly recorded which bonds were invalid; but the fact that they were invalid was not known to the plaintiff or his assignors until after the commencement of this action.

XVIII. That during the pendancy of said action by the plaintiff against the Wentworth Hotel Company and subsequent to the 26th day of July, 1907, the plaintiff duly proved and filed his claim against Henry S. McKee, assignee in insolvency of the Wentworth Hotel Company, for the principal and interest due upon each of said notes.

Dated May thirteenth, 1910.

ROLLINS & ROLLINS,
Attorneys for Plaintiff.
STEELE, OTIS & HALL,
Attorneys for Defendant.

(Endorsed:) Circuit Court, United States Southern Dist., New York.—Frank N. Thomas, Plaintiff, against Conrad H. Matthiessen, Defendant.—Stipulation.—Steele & Otis, Attorneys for Defendant, 20 Broad Street, New York City.

49 Circuit Court of the United States, Southern District of New York.

FRANK N. THOMAS, Plaintiff,
against
CONRAD H. MATTHIESSEN, Defendant.

Special Finding of Facts.

The issues in this action coming on to be tried by the Court without the intervention of a jury at stated term thereof held by the undersigned in and for the Southern District of New York in the Post Office Building in the Borough of Manhattan, and the attorneys of record of the parties hereto, respectively, having pursuant to statute previously filed with the Clerk a stipulation in writing signed by them waiving a jury and having upon the trial submitted to the Court a written statement of agreed facts signed by them, and no other evidence having been offered, now, after hearing Rollins & Rollins, Alfred A. Wheat of counsel, for the plaintiff, and Steele & Otis, Arthur C. Rounds and Harold Otis of counsel, for the defendant, and due deliberation having been had, I, the undersigned, the Justice before whom the action was so tried do hereby at the request of both parties make, sign and file this special finding of all the ultimate facts herein separately stated as follows, viz.:

I. That the plaintiff is and was at all times herein mentioned a citizen and resident of the State of California, residing therein, in the City of Pasadena, and the defendant is and was at all
50 times herein mentioned a citizen and resident of the State of New York, residing therein at Irvington, County of Westchester.

II. That the Wentworth Hotel Company is a corporation organized on the 12th day of April, 1906, under and pursuant to the laws of the Territory (now State) of Arizona, and that annexed to the answer herein as a part thereof and marked "Exhibit A" is a true copy of the Certificate of Incorporation of the said Wentworth Hotel Company. That the words "City of Pasadena," used in said Articles of Incorporation, referred to and designated the City of Pasadena, located within the State of California.

III. That prior to the incorporation of the said Wentworth Hotel Company the defendant subscribed a certain writing substantially as follows:

"It is proposed by the following subscribers to associate themselves into a corporation under the laws of Arizona for the purpose of acquiring a portion of the Oak Knoll, containing about twenty-

one acres, and building thereon a first-class hotel of about three hundred guests' rooms, the total costs of which it is estimated to be about $600,000. A portion of this amount is to be provided by an issue of first mortgage 5% bonds which will be sold at a price not less than 90 and accrued interest, the balance is to be provided for by the sale of stocks. It is proposed to organize the Company with a capital stock of $350,000, divided into 3,500 shares of a par value of $100 each, fully paid and non-assessable.

Referring to the foregoing, we the undersigned each for himself and not for others, hereby subscribe and agree to pay for
51 the number of shares set opposite our respective names. This subscription to be of force and effect immediately upon the whole amount of stock being subscribed and payments for same to be made in four equal installments, not less than sixty days apart, upon fifteen days' notice from the Treasurer."

That the words "Oak Knoll," used in said writing, referred to and designated Oak Knoll, situated near Pasadena, in the County of Los Angeles, State of California.

IV. That subsequent to the incorporation of the said Wentworth Hotel Company the defendant subscribed to one thousand shares of the capital stock of the said Wentworth Hotel Company at the par value of $100,000 and subsequently in good faith paid in cash to said Wentworth Hotel Company said sum of $100,000, the full amount of his subscription therefor and received a certificate from said corporation certifying his ownership of the said shares, and that the defendant was the owner of said one thousand shares of stock, a part of the subscribed stock of the said Wentworth Hotel Company, on the 5th day of October, 1906, and on the 16th day of November, 1906.

That at the time the defendant subscribed for said stock it was the purpose and intent of himself and of the other subscribers for stock in said Wentworth Hotel Company that said Company should have the power, among others, to erect a hotel and engage in the hotel business near the City of Pasadena, in the State of California, and that it would probably erect such a hotel and engage in such business, but it was the purpose and intent of such subscribers that their obligations as such and as stockholders in said Company
52 should be controlled and determined by the Articles of Incorporation of said Company and by the laws of Arizona.

V. That at the time of the defendant's subscription to the capital stock of said Wentworth Hotel Company and of his payment of the amount thereof and receipt of the certificate of stock above mentioned the defendant agreed with the said Wentworth Hotel Company and the incorporators and stockholders thereof that the capital stock so issued to the defendant by said company should be forever non-assessable by said corporation for any purpose and that the defendant and his property should be exempt from all liability for its debts or obligations, and that neither said corporation nor its officers or agents should have power to subject the defendant or the other stockholders of said corporation to any personal liability for

any debts or obligations of said Company; that at said times and at the time of the organization of said company and upon the 5th day of October 1906 and the 16th day of November, 1906, and long subsequent thereto the defendant had no knowledge or notice and was ignorant that any provisions of the Constitution or Laws of the State of California imposed or purported to impose any personal liability upon stockholder- of foreign corporations doing business in the State of California to creditors thereof, but on the contrary was advised and verily believed that as a result of his subscribing to and receiving stock in the said Wentworth Hotel Company paid for by him as aforesaid he would assume no personal liability to any creditors of said corporation upon any obligations it might thereafter incur, and upon the face of such belief and advice and in reliance upon his agreement with the said corporation and the incorporators and stockholders thereof and upon the provisions of the said certificate of incorporation and of the Laws of
53 Arizona the defendant subscribed and paid for said capital stock as aforesaid.

VI. That after the incorporation of said Wentworth Hotel Company, and prior to the 5th day of October, 1906, said Wentworth Hotel Company duly filed, pursuant to Section 408 of the Civil Code of said State, a certified copy of its articles of incorporation, a copy of which is annexed to the answer herein and marked "Exhibit A," as aforesaid, in the Office of the Secretary of State of the State of California, and a certified copy thereof in the County Clerk's Office, in the County of Los Angeles, in said State, in which County is situated the City of Pasadena, and in which are located the principal places of business of the First National Bank of Pasadena, and of the Union Savings Bank of Pasadena hereinafter mentioned; and that it also prior to said date, and pursuant to Section 405 of the Civil Code of said State, duly filed in the office of the Secretary of State of the State of California a designation of a person residing within that State upon whom process might be served and paid, pursuant to Chapter 380 of the Statutes of 1905, a State license tax; and said copies of said certificate of incorporation, upon such filing, became public records in said State and County. And that at all time since said filing the plaintiff and said First National Bank of Pasadena and said Union Savings Bank of Pasadena and each of them had full notice of the provisions of said certificate of incorporation, and that under the laws pursuant to which said Wentworth Hotel Company was incorporated and by virtue of the agreement of the incorporators and stockholders thereof said stockholders and this defendant were not subject and could not be subjected to any personal liability for any debts or liabilities of the said corporation or to any creditors thereof. After said filing, said Wentworth
54 Hotel Company purchased land in said County of Los Angeles, near the City of Pasadena, and erected a hotel thereon, and transacted business within the State of California until the 12th day of July, 1907, on which day said corporation was duly adjudged insolvent as hereinafter set forth.

VII. That an involuntary petition in insolvency was filed against

the Wentworth Hotel Company by certain creditors of said Company on the 24th day of May, 1907, in the Superior Court of the State of California, in and for the County of Los Angeles. That subsequently, to wit: On the 12th day of July, 1907, the said Wentworth Hotel Company was duly adjudged an insolvent and that upon the 25th day of July, 1907, Henry S. McKee was duly elected as assignee in insolvency of said Wentworth Hotel Company. That said Henry S. McKee duly qualified as assignee and gave bond in the sum of One hundred thousand Dollars ($100,000), which said bond was approved on the 25th day of July, 1907, and that the said Henry S. McKee has ever since been and is now the duly qualified and acting assignee in insolvency of the said Wentworth Hotel Company. That on the 26th day of July, 1907, the Clerk of the above-entitled Court by an instrument under his hand and seal of the Court assigned and conveyed to the assignee all of the estate real and personal of the debtor, and said assignment was recorded by the assignee in Recorder's Office of Los Angeles County on the 26th day of July, 1907, in book 3140, page 86 of Deeds, Los Angeles County Records.

VIII. That on or about the 5th day of October, 1906, at the City of Pasadena, in the State of California, the First National Bank of Pasadena, a National Banking Association, loaned to the said Wentworth Hotel Company the sum of Twenty-two
55 thousand five hundred dollars ($22,500), and in consideration thereof the said Wentworth Hotel Company made and delivered to said First National Bank of Pasadena its promissory note in writing, as follows:

"$22,500.00. PASADENA, CALIFORNIA, *October 5th*, 1906.

Thirty days after date, for value received, we jointly and severally promise to pay to the order of the First National Bank of Pasadena, at its banking house in the City of Pasadena, twenty-two thousand five hundred dollars with interest, from date until paid, at the rate of six per cent. per annum, payable monthly, and a reasonable attorney's fee to be fixed by the Court, if suit be instituted on this note. Principal and interest payable in Gold coin of the United States.

No. 24,194. Nov. 4 1906.

WENTWORTH HOTEL COMPANY.
M. C. WENTWORTH, *Pres.*
E. L. BEAN, *Sec't.*"

[SEAL.]
P. O. Address, —.

IX. That no part of the principal of said note has been paid and no interest thereon has been paid since the fourth day of February, 1907, though demand therefor has been duly made.

X. That on or about the 16th day of November, 1906, at the City of Pasadena, in the State of California, the Union Savings Bank of Pasadena, a California corporation, loaned to said Wentworth Hotel Company the sum of Twenty-five thousand dollars ($25,000), and in consideration thereof the Wentworth Hotel Company made
56 and *dile*vered to said Union Savings Bank of Pasadena its promissory note in writing as follows:

"$25,000.00. PASADENA, CAL., *Nov.* 16, 1906.

No. 2124 B.

One day after date, for value received, The Wentworth Hotel Co. promises to pay to Union Savings Bank of Pasadena, Cal., or order, at its banking house in Pasadena, California, twenty-five thousand dollars, with interest from date until paid, at the rate of 6 per cent. per annum, payable quarterly, and if not so paid, the interest shall become a part of the principal and thereafter bear like interest as the principal. Should this note be placed in the hands of an attorney for collection we agree to pay an additional sum of ten per cent. on principal as attorney's fees. Principal and interest payable in Gold Coin of the United States.

Address

THE WENTWORTH HOTEL COMPANY,

Address

[SEAL.] By M. C. WENTWORTH, *Its President.*

Address

By E. L. BEAN, *Its Secretary.*"

XI. That no part of the principal of said note has been paid and no interest thereon has been paid since the 16th day of February, 1907, though demand therefor has been duly made.

XII. That at the times when the two notes above mentioned were respectively made and delivered by the Wentworth Hotel Company, and the two sums of money were respectively loaned as aforesaid, the whole of the subscribed capital stock or shares of said Wentworth Hotel Company was three thousand five hundred (3,500)
57 shares of the par value of three hundred and fifty thousand dollars ($350,000), of which the defendant owned one thousand (1,000) shares of the par value of one hundred thousand dollars ($100,000).

XIII. That after the thirty-first day of January, 1907, and before the twenty-fourth day of May, 1907, each of the above-mentioned notes was duly assigned to the plaintiff without consideration, who has ever since held and now holds the same for the benefit of said banks respectively.

XIV. That on and after the date of maturity of the note mentioned in the complaint executed by the Wentworth Hotel Company to the First National Bank of Pasadena and until on or about the 31st day of January, 1907, the principal of said note together with interest thereon was the only debt of the Wentworth Hotel Company to said First National Bank of Pasadena, and during said period said First National Bank of Pasadena in the ordinary course of business, held cash on deposit to the credit of the Wentworth Hotel Company in the following amounts on the following days respectively, namely:

1906.		1906.	
Nov. 4-5-6	$28,000.22	Nov. 7	$40,500.22
8	25,558.99	9	25,460.39
10	23,370.80	11	23,197.70
12	15,721.25	13	13,702.10
14	11,935.61	15	10,410.01
16-17-18	9,823.23	19	2,903.25
20	2,743.25	21-2-3-4-5	1,559.55
26	1,523.80	27	1,466.80
28	1,386.80	29-30	731.21
Dec. 1-2	731.21	Dec. 7	2,028.08

58

Dec. 13-14-15-16	1,392.62	Dec. 17	$6,076.98
18	5,178.73	19	4,857.58
20	3,147.73	21	18,226.76
22-23	5,047.83	24-25	4,612.43
26	2,790.88	27	8,540.88
28	7,977.34	29-30	8,352.89
31	5,233.14		
1907.		1907.	
Jan. 3	1,303.49	Jan. 1-2	1,757.34
5-6	12,965.69	4	5,845.99
8	23,150.21	7	15,455.52
10	18,870.19	9	19,410.19
12	17,343.67	11	18,484.47
15	16,589.22	13-14	20,790.97
17	29,600.33	16	31,944.22
19-20	27,135.66	18	32,406.95
22	15,623.21	21	24,964.11
24	13,474.79	23	13,570.24
26-27	10,204.29	25	12,132.34
29	6,172.73	28	5,369.26
31	5,907.97	30	5,946.97

And said First National Bank of Pasadena from time to time after said dates respectively and before its assignment of said note paid out said sum to or upon the order of the Wentworth Hotel Company without applying the same to the payment of said note or previously obtaining, accepting or securing payment of said note or any part thereof by set-off or otherwise and without notice to or the assent of the defendant.

XV. That on and after the date of maturity of the note mentioned in the complaint executed by the Wentworth Hotel Company to the Union Savings Bank of Pasadena and until on or about the 31st day of January, 1907, the principal of said note, together with interest thereon, was the only debt of the Wentworth Hotel Company
59 to said Union Savings Bank of Pasadena, and during said period said Union Savings Bank of Pasadena in the ordinary course of business, held cash on deposit to the credit of the Went-

worth Hotel Company in the following amounts on the following days respectively, namely:

1906.		1906.	
Nov. 17.....	$10,545.09	Dec. 5.....	$5,358.84
Dec. 7.....	13,546.34	14.....	13,152.28
15.....	8,112.53	20.....	10,442.80
21.....	8,419.00	22.....	17,356.50
24.....	16,623.85	26.....	11,021.45
27.....	6,625.88	28.....	6,340.88
29.....	12,546.88	31.....	12,941.58
1907.		1907.	
Jan. 2.....	8,487.37	Jan. 3.....	8,101.87
4.....	11,063.21	5.....	9,052.21
7.....	20,741.46	8.....	18,326.26
9.....	7,057.59	10.....	6,521.59
11.....	12,525.59	12.....	10,900.59
14.....	8,846.59	15.....	13,924.64
16.....	13,504.64	17.....	24,954.89
19.....	20,996.27	21.....	18,555.67
22.....	15,555.67	23.....	11,143.52
24.....	12,415.92	25.....	11,322.63
26.....	6,984.74	28.....	2,618.87
29.....	1,958.07	30.....	9,695.87
31.....	9,673.57		

And said Union Savings Bank of Pasadena from time to time after said dates respectively and before its assignment of said note, paid out said sums to or upon the order of the Wentworth Hotel Company without applying the same to the payment of said note or previously obtaining, accepting or securing payment of said note or any part thereof by set-off or otherwise and without notice to or the assent of the defendant.

60 XVI. That after the 31st day of January, 1907, and after the assignment to the plaintiff of the notes mentioned in the complaint and prior to the 24th day of May, 1907, the plaintiff duly commenced action against the Wentworth Hotel Company in the Superior Court of the State of California, in and for the County of Los Angeles, to recover the principal and interest due upon each of said notes.

XVII. That at the time of the commencement of said action the property of the Wentworth Hotel Company was of great value, being in excess of four hundred and fifty thousand dollars ($450,000) and at the same time the aggregate amount of all debts of the Wentworth Hotel Company which were secured by said property or any part thereof, or upon which suit had already been commenced, did not exceed the sum of two hundred and seventy-five thousand dollars ($275,000). At the same time there were outstanding in addition two hundred and seventy-five thousand dollars ($275,000) face value of bonds purporting to be obligations of the Wentworth Hotel Company and purporting to be secured by said Company's

property under a trust deed duly recorded, which bonds were invalid; but the fact that they were invalid was not known to the plaintiff or his assignors until after the commencement of this action.

XVIII. That during the pendency of said action by the plaintiff against the Wentworth Hotel Company and subsequent to the 26th day of July, 1907, the plaintiff duly proved and filed his claim against Henry S. McKee, assignee in insolvency of the Wentworth Hotel Company, for the principal and interest due upon each of said notes.

Dated:

LEARNED HAND, *U. S. J.*

61 (Endorsed:) Circuit Court United States, Southern District New York.—Frank H. Thomas, plaintiff, against Conrad H. Matthiessen, defendant.—Special Finding of Facts.—Steele & Otis, 25 Broad Street, New York City.

United States District Court, Southern District of New York.

FRANK N. THOMAS, Plaintiff,
against
CONRAD H. MATTHIESSEN, Defendant.

The plaintiff respectfully requests the Court to make the following declarations of law with respect to the facts stipulated by the parties to be true and found by the Court as special findings of fact.

Declarations of Law.

I.

The decision of this case should be governed by the principles of law recognized and in force in the State of California.

Denied.—Learned Hand, U. S. J.

II.

62 It must be presumed that when the defendant subscribed to the stock of the Wentworth Hotel Company, he did so with reference to the Laws of California, and the liability imposed upon him by the Laws of California attended the transaction of all business done by the corporation in that State.

Denied.—Learned Hand, U. S. J.

III.

No intent of the defendant nor any understanding or agreement between him and the other stockholders of the Wentworth Hotel Company can defeat or impair the obligation imposed upon him by the Laws of California with respect to business transacted in that State.

Denied.—Learned Hand, U. S. J.

IV.

The fact that the plaintiff was ignorant of the laws of California and had been advised and believed that he would assume no personal liability to creditors of the Wentworth Hotel Company by subscribing to its stock, is no defense to this action.

Denied.—Learned Hand, U. S. J.

V.

The fact that the First National Bank of Pasadena and the Union Savings Bank of Pasadena, and each of them, had notice of the provisions of the certificate of incorporation of the Wentworth Hotel Company, is no defense to this action.

Denied.—Learned Hand, U. S. J.

VI.

The facts found in the special findings of facts and numbered XIV, XV, XVI, XVII and XVIII, do not constitute a defense to this action, nor to any part thereof.

Denied.—Learned Hand, U. S. J.

63

VII.

The plaintiff is entitled to judgment against the defendant for such proportion of the amount now due on the notes of the Wentworth Hotel Company in accordance with the findings of fact numbered VIII, IX, X and XI as one thousand bears to three thousand five hundred, together with the costs of this action, and judgment is directed accordingly.

Denied.—Learned Hand, U. S. J.

Respectively submitted,

ROLLINS & ROLLINS,
Attorneys for Plaintiff.

32 Nassau Street, Borough of Manhattan, New York City.

Exceptions are taken by the plaintiff to each of the foregoing rulings.

LEARNED HAND, *U. S. J.*

(Endorsed:) United States Circuit Court, Southern District of New York.—Frank N. Thomas, Plaintiff, against Conrad H. Matthiessen, Defendant.—Plaintiff's Request for Declarations of Law.—Rollins & Rollins, Attorneys for Plaintiff, No. 32 Nassau Street, New York.

64 United States Circuit Court, Southern District of New York.

FRANK M. THOMAS
vs.
CONRAD MATTHIESSEN.

Memorandum.

I am bound by the real decision of Judge Martin in this case and had his decision followed the opinion there could be no question of the propriety of a final judgment dismissing the complaint. Indeed in accordance with any consistent system of procedure I could do nothing else but follow that decision. However, instead of directing judgment in accordance with the opinion he sustained the demurrer and I am therefore met by a formal inconsistency between the actual judgment and the opinion. Yet Judge Martin's reasons for this course are quite apparent and were designed to expedite the final determination of the action; it remains quite certain that had he not supposed that what both parties preferred was to have the demurrer sustained he would have overruled it and sustained the defence. His opinion is not therefore an academic or merely obiter expression, but it is the result of his consideration of the actual controversy before him upon the very facts presented and upon the principle of stare decisis I am not free to disregard it, with direct consideration for the judicial opinion of a colleague in this court.

The only question therefore is whether the defence was proved
65 as alleged and an examination of the stipulated facts shows that it was. In short, I cannot find for the plaintiff except in the face of Judge Martin's opinion upon the demurrer and that I should not do, whatever might be my personal judgment upon the merits.

This renders academic and irrelevant any consideration of the supplemental defense and leads to a judgment of dismissal.

Complaint dismissed on the merits with costs.

7/10/10. L. H. *D. J.*

Circuit Court of the United States, Southern District of New York.

FRANK N. THOMAS, Plaintiff,
against
CONRAD H. MATTHIESSEN, Defendant.

Decision.

The issues in this action coming on to be tried by the Court without the intervention of a jury at a Stated Term thereof held by the undersigned in and for the Southern District of New York in the Post Office Building in the Borough of Manhattan, and the attorneys of record of the parties hereto, respectively, having, pursuant to

Statute, previously filed with the clerk a stipulation in writing signed by them waiving a jury, and having upon the trial submitted to the Court a written statement of agreed facts signed by them and no other evidence having been offered, and I, the undersigned, the Justice before whom the action was so tried, having at the
66 request of both parties made, signed and filed special finding of all the ultimate facts herein separately stated, Now, after hearing Rollins & Rollins, Alfred A. Wheat, of counsel for the plaintiff, and Steele & Otis, Arthur C. Rounds and Harold Otis, of counsel for the defendant, and due deliberation having been had, I, the undersigned, the Justice before whom the action was so tried, do hereby, on motion of the defendant's attorneys, direct that judgment be entered in favor of the defendant dismissing the complaint of the plaintiff on the merits with costs.

Dated New York, December 9th, 1910.

LEARNED HAND, *U. S. J.*

Exception to the plaintiff.

LEARNED HAND, *U. S. J.*

(Endorsed:) United States District Court, Southern District of New York.—Frank N. Thomas, plaintiff against Conrad H. Matthiessen, defendant.—Decision.—Steele & Otis, 25 Broad Street, Broad-Exchange Building, New York City.

67 Circuit Court of the United States, Southern District of New York.

FRANK N. THOMAS, Plaintiff,
against
CONRAD H. MATTHIESSEN, Defendant.

Judgment.

The issues in this action coming on to be tried before the Hon. Learned Hand, United States Judge, without the intervention of a jury at a Stated Term of this Court held on the 21st day of May, 1910, at the Post Office Building in the Borough of Manhattan, New York City, and the attorneys of record of the parties hereto, respectively, having pursuant to statute previously filed with the Clerk a stipulation in writing signed by them waiving a jury and having upon the trial submitted to the Court a written statement of agreed facts signed by them, and no other evidence having been offered, and the plaintiff having appeared by Messrs. Rollins & Rollins, Alfred J. Wheat, of counsel, and the defendant having appeared by Steele & Otis, Arthur C. Rounds, and Harold Otis, of counsel, and the issues having been tried and the Court having made, signed and filed a special Finding of Facts, and the Court having rendered it- decision in favor of the defendant and against the plaintiff and having directed that judgment be entered in favor of the defendant dismissing the complaint of the plaintiff on the merits with costs,

Now, on motion of Steele & Otis, attorneys for the defend-
68 ant, it is

Ordered and adjudged that the defendant have judgment against the plaintiff dismissing the complaint upon the merits and that the defendant recover of the plaintiff the sum of thirty-eight and 25/100 dollars ($38.25), the amount of his costs and disbursements as adjusted by the clerk of this Court and that the defendant have execution therefor against the plaintiff.

Judgment signed and entered in this Court on the 14th day of December, 1910.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) United States Circuit Court, Southern District of New York.—Frank N. Thomas, Plaintiff, against Conrad H. Matthiessen, Defendant.—Judgment.—Steele & Otis, Attorneys for Defendant, 25 Broad St., New York City.—U. S. Circuit Court, Southern District N. Y.—Filed Dec. 14, 1910, 4 P. M.—John A. Shields, Clerk.

69 Circuit Court of the United States, Southern District of New York.

FRANK N. THOMAS, Plaintiff,
against
CONRAD H. MATTHIESSEN, Defendant.

Bill of Exceptions.

Be it remembered that on the trial of this cause in this Court before the Honorable Learned Hand, United States Judge, without the intervention of a jury, at a Stated Term of this Court held on the 21st day of May, 1910, at the Post Office Building in the Borough of Manhattan, City of New York, the following proceedings were had, to wit:

The parties hereto by their respective attorneys of record, Messrs. Rollins & Rollins, Alfred A. Wheat, of counsel for the plaintiff, and Messrs. Steele & Otis, Arthur C. Rounds and Harold Otis, of counsel for the defendant, having pursuant to the statute previously filed with the Clerk a stipulation in writing signed by them waiving a jury, submitted to the Court the following written statement of agreed facts signed by them which, at the request of both parties was made, signed and filed by the Justice before whom the action was tried as a special finding of all the ultimate facts in the case:

70 *Findings of Fact.*

I.

That the plaintiff is and was at all times herein mentioned a citizen and resident of the State of California, residing therein, in

the City of Pasadena, and the defendant is and was at all times herein mentioned a citizen and resident of the State of New York, residing therein at Irvington, County of Westchester.

II.

That the Wentworth Hotel Company is a corporation organized on the 12th day of April, 1906, under and pursuant to the laws of the Territory (now State) of Arizona, and that annexed to the answer herein as a part thereof and marked "Exhibit A," is a true copy of the certificate of incorporation of the said Wentworth Hotel Company. That the words "City of Pasadena" used in said Articles of Incorporation, referred to and designated the City of Pasadena, located within the State of California.

III.

That prior to the incorporation of the said Wentworth Hotel Company the defendant subscribed a certain writing substantially as follows:

"It is proposed by the following subscribers to associate themselves into a Corporation under the laws of Arizona for the purpose of acquiring a portion of the Oak Knoll, containing about twenty-one acres, and building thereon a first-class hotel of about three hundred guest rooms, the total cost of which it is estimated to be about $600,000. A portion of this amount is to be provided by an issue of first mortagge 5% bonds, which will be sold at a price not
71 less than 90 and accrued interest, the balance is to be provided for by the sale of stock. It is proposed to organize the Company with a capital stock of $350,000, divided into 3,500 shares of a par value of $100 each, fully paid and non-assessable.

Referring to the foregoing, we, the undersigned, each for himself and not for others, hereby subscribe and agree to pay for the number of shares set opposite our respective names. This subscription to be of force and effect immediately upon the whole amount of stock being subscribed and payments for same to be made in four equal installments, not less than sixty days apart, upon fifteen days' notice from the Treasurer."

That the words "Oak Knoll," used in said writing referred to and designated Oak Knoll, situated near Pasadena, in the County of Los Angeles, State of California.

IV.

That subsequent to the incorporation of the said Wentworth Hotel Company the defendant subscribed to one thousand shares of the capital stock of the said Wentworth Hotel Company at the par value of $100,000, and subsequently in good faith paid in cash to said Wentworth Hotel Company said sum of $100,000, the full amount of his subscription thereto, and received a certificate from said corporation certifying his ownership of the said shares, and that the defendant was the owner of said one thousand shares of stock, a part of the subscribed stock of the said Wentworth Hotel Company,

on the 5th day of October, 1906, and on the 16th day of November, 1906.

That at the time the defendant subscribed for said stock it was the purpose and intent of himself and the other subscribers for
72 stock in said Wentworth Hotel Company that said Company should have the power, among others, to erect a hotel and engage in the hotel business near the City of Pasadena, in the State of California, and that it would probably erect such a hotel and engage in such business, but it was the purpose and intent of such subscribers that their obligations as such and as stockholders in said company should be controlled and determined by the articles of incorporation of said Company and by the laws of Arizona.

V.

That at the time of the defendant's subscription to the capital stock of said Wentworth Hotel Company and of his payment of the amount thereof and receipt of the certificate of stock above mentioned the defendant agreed with the said Wentworth Hotel Company and the incorporators and stockholders thereof that the capital stock so issued to the defendant by said Company should be forever non-assessable by said corporation for any purpose and that the defendant and his property should be exempt from all liability for its debts or obligations, and that neither said corporation nor its officers or agents should have power to subject the defendant or the other stockholders of said corporation to any personal liability for any debts or obligations of said Company; that at said times and at the time of the organization of said Company and upon the 5th day of October, 1906, and the 16th day of November, 1906, and long subsequent thereto the defendant had no knowledge or notice and was ignorant that any provisions of the Constitution or Laws of the State of California imposed or purported to impose any personal liability upon stockholders of foreign corporations doing business in the State of California to creditors thereof, but on the contrary was ad-
73 vised and verily believed that as a result of his subscribing to and receiving stock in the said Wentworth Hotel Company paid for by him as aforesaid he would assume no personal liability to any creditors of said corporation upon any obligations it might thereafter incur, and upon the faith of such belief and advice and in reliance upon his agreement with the said corporation and the incorporators and stockholders thereof and upon the provisions of the said certificate of incorporation and of the Laws of Arizona the defendant subscribed and paid for said capital stock as aforesaid.

VI.

That after the incorporation of said Wentworth Hotel Company, and prior to the 5th day of October, 1906, said Wentworth Hotel Company duly filed, pursuant to Section 408 of the Civil Code of said State, a certified copy of its articles of incorporation, a copy of which is annexed to the answer herein and marked "Exhibit A," as afore-

said, in the office of the Secretary of State of the State of California, and a certified copy thereof in the County Clerk's Office, in the County of Los Angeles, in said State, in which county is situated the City of Pasadena, and in which are located the principal places of business of the First National Bank of Pasadena, and of the Union Savings Bank of Pasadena hereinafter mentioned; and that it also prior to said date, and pursuant to Section 405 of the Civil Code of said State, filed in the office of the Secretary of State of the State of California a designation of a person residing within that State upon whom process might be served, and paid, pursuant to Chapter 380 of the statutes of 1905, a state license tax; and said copies of said certificate of incorporation, upon such filing, became public records in said State and county. And that at all times since said filing, the plaintiff and said First National Bank of Pasadena and
74 said Union Savings Bank of Pasadena and each of them had full notice of the provisions of said certificate of incorporation, and that under the laws pursuant to which said Wentworth Hotel Company was incorporated and by virtue of the agreement of the incorporators and stockholders thereof said stockholders and this defendant were not subject and could not be subjected to any personal liability for any debts or liabilities of the said corporation or to any creditors thereof. After said filing, said Wentworth Hotel Company purchased land in said County of Los Angeles, near the City of Pasadena, and erected a hotel thereon, and transacted business within the State of California until the 12th day of July, 1907, on which day said corporation was duly adjudged insolvent as hereinafter set forth.

VII.

That an involuntary petition in insolvency was filed against the Wentworth Hotel Company by certain creditors of said Company on the 24th day of May, 1907, in the Superior Court of the State of California, in and for the County of Los Angeles. That subsequently, to wit: On the 12th day of July, 1907, the said Wentworth Hotel Company was duly adjudged an insolvent and that upon the 25th day of July, 1907, Henry S. McKee was duly elected as Assignee in insolvency of said Wentworth Hotel Company. That said Henry S. McKee duly qualified as Assignee and gave bond in the sum of One hundred thousand dollars ($100,000.00), which said bond was approved on the 25th day of July, 1907, and that the said Henry S. McKee has ever since been and is now the duly qualified and acting Assignee in insolvency of the said Wentworth Hotel Company. That on the 26th day of July, 1907, the Clerk of the above-entitled Court by an instrument under his hand and seal of the
75 Court, assigned and conveyed to the Assignee all of the estate real and personal of the debtor, and said assignment was recorded by the Assignee in Recorder's Office of Los Angeles County on the 26th day of July, 1907, in Book 3140, page 86 of Deeds, Los Angeles County Records.

VIII.

That on or about the 5th day of October, 1906, at the City of Pasadena, in the State of California, the First National Bank of Pasadena, a National Banking Association, loaned to the Wentworth Hotel Company the sum of Twenty-two thousand five hundred dollars ($22,500), and in consideration thereof the said Wentworth Hotel Company made and delivered to said First National Bank of Pasadena its promissory note in writing, as follows:

"22,500.00. PASADENA, CALIFORNIA, *October 5th*, 1906.

Thirty days after date, for value received, we jointly and severally promise to pay to the order of the The First National Bank of Pasadena, at its banking house in the City of Pasadena, Twenty-two thousand five hundred dollars, with interest, from date until paid, at the rate of six per cent. per annum, payable monthly, and a reasonable attorney's fee, to be fixed by the Court, if suit be instituted on this note. Principal and interest payable in Gold Coin of the United States.

WENTWORTH HOTEL COMPANY.
M. C. WENTWORTH, *Pres.*
[SEAL.] E. L. DEAN, *Sect.*"

No. 24194.
Nov. 4, 1906.

P. O. Address, ——.

IX.

That no part of the principal of said note has been paid and no interest thereon has been paid since the fourth day of Feb-
76 ruary, 1907, though demand therefor has been duly made.

X.

That on or about the 16th day of November, 1906, at the City of Pasadena, in the State of California, the Union Savings Bank of Pasadena, a California corporation, loaned to said Wentworth Hotel Company the sum of Twenty-five thousand dollars ($25,000), and in consideration thereof the Wentworth Hotel Company made and delivered to said Union Savings Bank of Pasadena its promissory note in writing, as follows:

"$25000.00. PASADENA, CAL., *Nov.* 16, 1906.

No. 2124-B.

One day after date, for value received, The Wentworth Hotel Co. promises to pay to Union Savings Bank of Pasadena, Cal., or order, at its banking house in Pasadena, California, twenty-five thousand dollars, with interest from date until paid, at the rate of 6 per cent. per annum, payable quarterly, and if not so paid, the interest shall become a part of the principal and thereafter bear like interest as

the principal. Should this note be placed in the hands of an attorney for collection we agree to pay an additional sum of ten per cent. on principal as attorney's fees. Principal and interest payable in Gold Coin of the United States.

Address, ——.

THE WENTWORTH HOTEL COMPANY,

Address, ——.

By M. C. WENTWORTH, *Its President.*

Address, ——.

[SEAL.] By E. L. BEAN, *Its Secretary.*"

77 XI.

That no part of the principal of said note has been paid and no interest thereon has been paid since the 16th day of February, 1907, though demand therefor has been duly made.

XII.

That at the times when the two notes above mentioned were respectively made and delivered by the Wentworth Hotel Company, and the two sums of money were respectively loaned as aforesaid, the whole of the subscribed capital stock or shares of said Wentworth Hotel Company was three thousand five hundred (3,500) shares of the par value of Three hundred and fifty thousand dollars ($350,000), of which the defendant owned One thousand (1,000) shares of the par value of One hundred thousand dollars ($100,000).

XIII.

That after the thirty-first day of January, 1907, and before the twenty-fourth day of May, 1907, each of the above mentioned notes was duly assigned to the plaintiff without consideration, who has ever since held and now holds the same for the benefit of said banks respectively.

XIV.

That on and after the date of maturity of the note mentioned in the complaint executed by the Wentworth Hotel Company to the First National Bank of Pasadena and until on or about the 31st day of January, 1907, the principal of said note together with interest thereon was the only debt of the Wentworth Hotel Company to said First National Bank of Pasadena, and during said period said First National Bank of Pasadena in the ordinary course of business, held cash on deposit to the credit of the Wentworth Hotel Com-
78 pany in the following amounts on the following days respectively, namely:

1906.		1906.	
Nov. 4-5-6.....	$28,000.22	Nov. 7.....	$40,500.22
8.....	25,558.99	9.....	25,460.39
10.....	23,370.80	11.....	23,197.70
12.....	15,721.25	13.....	13,702.10

	14	11,935.61		15	10,410.01
	16-17-18	9,823.23		19	2,903.25
	20	2,743.25		21-2-3-4-5	1,559.55
	26	1,523.80		27	1,466.80
	28	1,386.80		29-30	731.21
Dec.	1-2	731.21	Dec.	7	2,028.08
	13-14-15-16	1,392.62		17	6,076.98
	18	5,178.73		19	4,857.58
	20	3,147.73		21	18,226.76
	22-23	5,047.83		24-25	4,612.43
	26	2,790.88		27	8,540.88
	28	7,977.34		29-30	8,352.89
	31	5,233.14			

1907.			1907.		
Jan.	3	1,303.49	Jan.	1-2	1,757.34
	5-6	12,965.69		4	5,845.99
	8	23,150.21		7	15,455.52
	10	18,870.19		9	19,410.19
	12	17,343.67		11	18,484.47
	15	16,589.22		13-14	20,790.97
	17	29,600.33		16	31,944.22
	19-20	27,135.66		18	32,406.95
	22	15,623.21		21	24,964.11
	24	13,474.79		23	13,570.24
	26-27	10,204.29		25	12,132.34
	29	6,172.73		28	5,369.26
	31	5,907.97		30	5,946.97

And said First National Bank of Pasadena from time to time after said dates respectively and before its assignment of said note
79 paid out said sums to or upon the order of the Wentworth Hotel Company without applying the same to the payment of said note or previously obtaining, accepting or securing payment of said note or any part thereof by set-off or otherwise and without notice to or the assent of the defendant.

XV.

That on and after the date of maturity of the note mentioned in the complaint executed by the Wentworth Hotel Company to the Union Savings Bank of Pasadena and until on or about the 31st day of January, 1907, the principal of said note together with interest thereon was the only debt of the Wentworth Hotel Company to said Union Savings Bank of Pasadena, and during said period said Union Savings Bank of Pasadena in the ordinary course of business held cash on deposit to the credit of the Wentworth Hotel Company in the following amounts on the following days respectively, namely:

1906.		1906.	
Nov. 11	$10,545.09	Dec. 5	$5,358.84
Dec. 7	13,546.34	14	13,152.28
15	8,112.53	20	10,442.80
21	8,419.00	22	17,356.50
24	16,623.85	26	11,021.45
27	6,625.88	28	6,340.88
29	12,546.88	31	12,941.58
1907.		1907.	
Jan. 2	8,487.37	Jan. 3	8,101.87
4	11,063.21	5	9,052.21
7	20,741.46	8	18,326.26
9	7,057.59	10	6,521.59
11	12,525.59	12	10,900.59
14	8,846.59	15	13,924.64
16	13,504.64	17	24,954.89
80			
Jan. 19	20,996.27	Jan. 21	18,555.67
22	15,555.67	23	11,143.52
24	12,415.92	25	11,322.63
26	6,984.74	28	2,618.87
29	1,958.07	30	9,695.87
31	9,673.57		

And said Union Savings Bank of Pasadena from time to time after said dates respectively and before its assignment of said note paid out said sums to or upon the order of the Wentworth Hotel Company without applying the same to the payment of said note or previously obtaining accepting or securing payment of said note or any part thereof by set-off or otherwise and without notice to or the assent of the defendant.

XVI.

That after the 31st day of January, 1907, and after the assignment to the plaintiff of the notes mentioned in the complaint and prior to the 24th day of May, 1907, the plaintiff duly commenced action against the Wentworth Hotel Company in the Superior Court of the State of California, in and for the County of Los Angeles, to recover the principal and interest due upon each of said notes.

XVII.

That at the time of the commencement of said action the property of the Wentworth Hotel Company was of great value, being in excess of Four hundred and fifty thousand dollars ($450,000) and at the same time the aggregate amount of all debts of the Wentworth Hotel Company which were secured by said property or any part thereof, or upon which suit had already been commenced did not exceed the sum of Two hundred and seventy-five thousand

dollars ($275,000). At the same time there were outstanding in addition Two hundred and seventy-five thousand dollars ($275,000) face value of bonds purporting to be obligations of the Wentworth Hotel Company and purporting to be secured by said Company's property under a trust deed duly recorded, which bonds were invalid; but the fact that they were invalid was not known to the plaintiff or his assignors until after the commencement of this action.

XVIII.

That during the pendency of this action by the plaintiff against the Wentworth Hotel Company and subsequent to the 26th day of July, 1907, the plaintiff duly proved and filed his claim against Henry S. McKee, assignee in insolvency of the Wentworth Hotel Company, for the principal and interest due upon each of said notes.

No other evidence having been offered, and the Court having heard arguments by the counsel of the respective parties, the plaintiff by his counsel respectfully requested the Court to make the following declarations of law with respect to the facts stipulated by the parties to be true and found by the Court as special findings of fact:

Declarations of Law.

I.

The decision of this case should be governed by the principles of law recognized and in force in the State of California.

II.

It must be presumed that when the defendant subscribed to the stock of the Wentworth Hotel Company, he did so with reference to the laws of California and the liability imposed upon him by the laws of California attended the transaction of all business done by the corporation in that State.

82

III.

No intent of the defendant, nor any understanding or agreement between him and the other stockholders of the Wentworth Hotel Company can defeat or impair the obligation imposed upon him by the laws of California with respect to business transacted in that State.

IV.

The fact that the plaintiff was ignorant of the laws of California and had been advised and believed that he would assume no personal liability to creditors of the Wentworth Hotel Company by subscribing to its stock, is no defense to this action.

V.

The fact that the First National Bank of Pasadena and the Union Savings Bank of Pasadena, and each of them, had notice of the

provisions of the Certificate of Incorporation of the Wentworth Hotel Company, is no defense to this action.

VI.

The facts found in the special findings of facts and numbered XIV, XV, XVI, XVII and XVIII, do not constitute a defense to this action, nor to any part thereof.

VII.

The plaintiff is entitled to judgment against the defendant for such proportion of the amount now due on the notes of the Wentworth Hotel Company in accordance with the findings of facts numbered VIII, IX, X and XI as one thousand bears to three thousand five hundred, together with the costs of this action, and judgment is directed accordingly.

The Court refused to make all or any of the above stated declarations of law requested by counsel for the plaintiff, and as to
83 each and all of said rulings of the Court counsel for the plaintiff then and there excepted.

Thereupon the Court rendered its decision in the following language, to which counsel for the plaintiff then and there excepted:

"The issues in this action coming on to be tried by the Court without the intervention of a jury at a Stated Term thereof held by the undersigned in and for the Southern District of New York in the Post Office Building in the Borough of Manhattan, and the attorneys of record of the parties hereto, respectively, having, pursuant to statute, previously filed with the Clerk a stipulation in writing signed by them waiving a jury, and having upon the trial submitted to the Court a written statement of agreed facts signed by them and no other evidence having been offered, and I, the undersigned, the Justice before whom the action was so tried, having at the request of both parties made, signed and filed a special finding of all the ultimate facts herein separately stated, now, after hearing Rollins & Rollins, Alfred A. Wheat, of counsel for the plaintiff, and Steele & Otis, Arthur C. Rounds and Harold Otis, of counsel for the defendant, and due deliberation having been had, I, the undersigned, the Justice before whom the action was so tried, do hereby, on motion of the defendant's attorneys, direct that judgment be entered in favor of the defendant, dismissing the complaint of the plaintiff on the merits, with costs.

Dated: New York, December 9th, 1910.

LEARNED HAND, *U. S. J.*

Exception to the plaintiff.

LEARNED HAND, *U. S. J.*"

84 And now, in furtherance of justice and that right may obtain, the plaintiff, Frank N. Thomas, tenders and presents the foregoing as his bill of exceptions in this case to the action of the Court, and prays that the same may be settled, and allowed,

and signed, and sealed by the Court and made a part of the record, and the same is accordingly done this 23d day of January, 1911.

LEARNED HAND, *U. S. J.*

(Endorsed:) Service of a copy of the within Bill of Exceptions is admitted this 20th day of January, 1911, and notice of settlement is hereby waived.—Steele & Otis, Attorneys for Defendant.—U. S. Circuit Court, Southern District N. Y.—Filed Jan. 25, 1911.—John A. Shields, Clerk.

Circuit Court of the United States for the Southern District of New York.

FRANK N. THOMAS, Plaintiff,
against
CONRAD H. MATTHIESSEN, Defendant.

Assignment of Errors.

Now comes the said plaintiff Frank N. Thomas and assigns error in the decision of said Circuit Court as follows:

First. The Court erred in directing that judgment be en-
85 tered in favor of the defendant, dismissing the complaint of the plaintiff on the merits, with costs.

Second. The Court erred in refusing to make the following declarations of law with respect to the facts stipulated by the parties to be true and found by the Court as special findings of fact:

I.

The decision of this case should be governed by the principles of law recognized and in force in the State of California.

II.

It must be presumed that when the defendant subscribed to the stock of the Wentworth Hotel Company, he did so with reference to the laws of California and the liability imposed upon him by the laws of California attended the transaction of all business done by the corporation in that State.

III.

No intent of the defendant, nor any understanding or agreement between him and the other stockholders of the Wentworth Hotel Company can defeat or impair the obligation imposed upon him by the laws of California with respect to business transacted in that State.

IV.

The fact that the plaintiff was ignorant of the laws of California and had been advised and believed that he would assume no per-

sonal liability to creditors of the Wentworth Hotel Company by subscribing to its stock, is no defense to this action.

V.

The fact that the First National Bank of Pasadena and the
86 Union Savings Bank of Pasadena, and each of them, had notice of the provisions of the Certificate of Incorporation of the Wentworth Hotel Company, is no defense to this action.

VI.

The facts found in the special finding of facts and numbered XIV, XV, XVI, XVII and XVIII, do not constitute a defense to this action, nor to any part thereof.

VII.

The plaintiff is entitled to judgment against the defendant for such proportion of the amount now due on the notes of the Wentworth Hotel Company in accordance with the findings of fact numbered VIII, IX, X and XI as one thousand bears to three thousand five hundred, together with the costs of this action, and judgment is directed accordingly.

Wherefore, plaintiff, Frank N. Thomas, prays that the judgment of the Circuit Court of the United States for the Southern District of New York may be reversed.

ROLLINS & ROLLINS,
Attorneys for Plaintiff.

(Endorsed:) U. S. Circuit Court, Southern District N. Y.—Filed Jan. 24, 1911.—John A. Shields, Clerk.

87 Circuit Court of the United States, Southern District of New York.

FRANK N. THOMAS, Plaintiff,
against
CONRAD H. MATTHIESSEN, Defendant.

Stipulation Waiving Bond.

It is hereby stipulated and agreed by and between the attorneys of record for the respective parties in the above-styled action that the execution and filing of a bond by the plaintiff in the writ of error issuing from the Circuit Court of Appeals of the United States, Second Circuit, in the said action, be and hereby is waived.

ROLLINS & ROLLINS,
Attorneys for Plaintiff.
STEELE & OTIS,
Attorneys for Defendant.

So ordered.
LEARNED HAND, *U. S. J.*

(Endorsed:) Service of a copy of the within Stipulation is admitted this 25th day of January, 1911—Steele & Otis, Attorneys for Defendant-in-Error—U. S. Circuit Court, Southern District N. Y.—Filed Jan. 25, 1911—John A. Shields, Clerk.

88 By the Honorable Learned Hand, one of the judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, to Conrad H. Matthiessen, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 20th day of February, 1911, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein Frank N. Thomas is plaintiff-in-error and you are defendant-in-error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 24th day of January, in the year of our Lord One Thousand Nine Hundred and Eleven, and of the Independence of the United States the One Hundred and Thirty-fifth.

LEARNED HAND,
Judge of the — Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit.—Frank N. Thomas, Plaintiff, vs. Conrad H. Matthiessen, Defendant. Citation—Rollins & Rollins, Attorneys for Plaintiff-in-Error. Due service of a copy of the within citation is hereby admitted this 25th day of January, 1911.—Steele & Otis, Attorneys for Defendant-in-Error.—U. S. Circuit Court, Southern District N. Y.—Filed Jan. 25, 1911.—John A. Shields, Clerk.

89 United States Circuit Court of Appeals for the Second Circuit, October Term, 1911.

No. 51.

FRANK N. THOMAS, Plaintiff-in-Error,
vs.
CONRAD H. MATTHIESSEN, Defendant-in-Error.

Argued November 13, 1911. Decided December 11, 1911.

In Error to the Circuit Court of the United States for the Southern District of New York.

Before Lacombe, Coxe and Ward, Circuit Judges.

WARD, *Circuit Judge:*

The plaintiff, assignee of a California bank, sues the defendant, a citizen and resident of New York, and a holder of full paid stock of

an Arizona corporation, for such proportion of a debt incurred by that corporation in the State of California as his stock in the corporation bears to the whole of its subscribed capital stock.

The charter of the Arizona corporation provides that it may carry on the business of building and operating hotels anywhere and that its principal place of business outside of Arizona shall be the city of Pasadena.

The charter was filed in the office of the Secretary of State of California and a person designated upon whom process might be served.

It is stipulated by the parties inter alia:

"That at the time the defendant subscribed for said stock it was the purpose and intent of himself and of the other subscribers for stock in said Wentworth Hotel Company that said company
90 should have the power among others to erect a hotel and engage in the hotel business near the city of Pasadena in the state of California and that it would probably erect such a hotel and engage in such business, but it was the purpose and intent of such subscribers that their obligations as such and as stockholders in said company should be controlled and determined by the articles of incorporation of said company and by the laws of Arizona."

The charter further provides:

"The private property of the stockholders of this corporation shall be and is hereby made forever exempt from all liability for its debts or obligations."

The ground on which the plaintiff claims to recover is that the constitution of California, Art. XII Sec. 3 makes stockholders of its own corporations personally liable for the company's debts to this extent and further provides, Sec. 15, that no corporation organized outside of the state shall be allowed to do business within the state on more favorable conditions than are prescribed by law for its own corporations. Sec. 322 of the Civil Code of California prescribes the manner in which suits against stockholders shall be brought.

That the state incorporating a company may by statute impose such liability upon stockholders irrespective of their residence which may be enforced everywhere is well settled. Such a liability though created by statute is of a contractual nature, because those who become stockholders are presumed to have assented to it, Whitman v. The Bank, 176 U. S. 559, 563. The theory upon which it is sought to recover of the defendant is that he must be presumed to have assented to be bound by the laws of California in respect to any business done by the corporation there and so to have subjected himself to that additional liability. If such an assent may be assumed, then the plaintiff is entitled to recover of the defendant in any court which has jurisdiction of his person, notwithstanding that he is a resident and citizen of the state of New York and that the charter of Arizona does not impose such liability upon him.

The plaintiff relies on the case of Pinney v. Nelson, 183
91 U. S. 144, in which just this additional liability under the laws of California was sought to be imposed upon a citizen and resident of California who was a stockholder of a Colorado cor-

poration by the laws of which state there was no personal liability of stockholders. The charter provided that the company was created for the purpose of carrying on part of its business outside of Colorado and principally in California. Nothing was said about the extent of the liability of stockholders.

It is said that this decision being on writ of error to the state court, the only question upon which the Supreme Court passed was the federal question by virtue of which the cause was brought up, viz., whether the California statute impaired the obligation of the stockholder's contract; deprived him of his property without due process of law and denied him the equal protection of the laws and was therefore unconstitutional. But the reasoning of the Supreme Court disposed of the whole case.

Mr. Justice Brewer said:

"Passing to a consideration of the stockholders' contract in the light of the other contention, it may be said that ordinarily it is controlled by the law of the State in which the incorporation is had. That is the place of contract, and, generally, the law of the place where a contract is made governs its nature, interpretation and obligation. While this is so, it is also true that parties in making a contract may have in view some other law than that of the place, and when that is so that other law will control. That the parties have some other law in view and contract with reference to it is shown by an express declaration to that effect. In the absence of such declaration it may be disclosed by the terms of the contract and the purpose with which it is entered into.

* * * * * * *

"Now when they in terms specified that they were framing a corporation for the purpose of having that corporation do business in California is it not clear that they were contracting with reference to the laws of that State? Contracting with reference to the laws of that State they must be assumed to know the provisions of those laws; that by them a personal liability was cast upon the
92 stockholders in corporations formed under the laws of the State, and that that same liability was also imposed upon the stockholders of corporations formed under the laws of other States and doing business within California. How can it be said that those laws do not enter into the contract and control as to all business done in pursuance of that contract within the limits of California."

And the opinion ended up with this sentence:

"All that we here hold is that when a corporation is formed in one State, and by the express terms of its charter it is created for doing business in another State, and business is done in that State, it must be assumed that the charter contract was made with reference to its laws; and the liabilities which those laws impose will attend the transaction of such business."

It is quite evident that stockholders are bound by the statutes of the incorporating state, whether they assent to them or not and that they are bound by the statutes of another state in which the corporation does business if they have assented to be so bound. Such an

assent was found by the Supreme Court in the Pinney case to be implied from the terms and purpose of the charter, but we do not see how it could be implied if the charter contained an express provision to the contrary.

If a corporation whose stockholders were not personally liable and whose charter said nothing about doing business in California did do business there, could it be said that the stockholders had assented to be bound by the law of California imposing an additional personal liability? It could hardly be contended that in the language of Mr. Justice Brewer, "they were contracting with reference to the laws of that state."

Or if a corporation whose stockholders were made personally liable by the incorporating state did business in accordance with the provision of its charter in another state which prohibited foreign corporations from doing business there except upon the same terms as its own corporations and stockholders of its own corporations were not personally liable, could it be assumed as against their contract that they did not intend to be personally liable upon its contracts made in the non-incorporating state?

93 To arrive at such a result there must be something more than the law of the non-incorporating state. Doubtless it could prohibit a corporation whose charter relieved its stockholders from all personal liability from doing business in the state; could drive it from the state; could penalize it and its officers and agents for attempting to do business in the state, but we do not think it could ex proprio vigore make a contract for the stockholders to be bound by its provisions. If it could, corporate stock is liabile to become in this country an uncertain and even dangerous asset. In the language of Lord Justice Romer in Risdon v. Furness, L. R. (1906) 1 K. B. 59:

"I need hardly point out that the shareholder and the company are different entities, and that the judgment obtained abroad is a judgment against the company, which prima facie does not affect the shareholder. If the shareholder and the company are treated as different entities the plaintiffs cannot by law enforceable in this country say that the company, trading in California, must, though, without authority from the shareholder, nevertheless be held to have contracted so as to make him liable."

The Risdon case was a suit against a stockholder of an English corporation registered in California and doing business there, to recover his proportion of debts contracted by the company in California. The charter covered the doing of a mining business anywhere in the world and expressly in the United States. The court held that if the inference could be drawn from the facts in Pinney v. Nelson that the stockholders had agreed to be bound by the law of California, such inference could not be drawn in the case under consideration. Both courts were inquiring about the stockholders' contract and considering the question of the stockholders' consent. The construction adopted in the Risdon case was more favorable to stockholders than was that of Pinney v. Nelson, but we do not think the

latter requires us to assume an intention upon the part of stockholders which contradicts the express provisions of their charter.

The judgment is affirmed with costs.

Alfred A. Wheat, for the Plaintiff-in-Error.
A. C. Rounds, for the Defendant-in-Error.

94 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms in the Post-Office Building in the City of New York, on the 21st Day of December, One Thousand Nine Hundred and Eleven.

Present: Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Henry G. Ward, Circuit Judges.

FRANK N. THOMAS, Plaintiff in Error,
vs.
CONRAD H. MATTHIESSEN, Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

E. H. L.

95 Endorsed: United States Circuit Court of Appeals, Second Circuit. F. N. Thomas vs. C. N. Matthiessen. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Dec. 21, 1911. William Parkin, Clerk.

96 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 95 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Frank N. Thomas against Conrad H. Matthiessen as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 15th day of January in the year of our Lord One Thousand Nine Hundred and Twelve

and of the Independence of the said United States the One Hundred and thirty-sixth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

97 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Frank N. Thomas is plaintiff in error, and Conrad H. Matthiessen is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court
98 of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 28th day of February, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

99 [Endorsed:] File No. 23,024. Supreme Court of the United States. No. 948, October Term, 1911. Frank N. Thomas, Petitioner, vs. Conrad H. Matthiessen. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 4, 1912. William Parkin, Clerk.

100 United States Circuit Court of Appeals for the Second Circuit.

FRANK N. THOMAS, Plaintiff in Error,
against
CONRAD H. MATTHIESSEN, Defendant in Error.

It is hereby stipulated and agreed that the certified transcript of the record in the above entitled cause, heretofore filed with the Clerk of the Supreme Court of the United States upon an application for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit (No. 948, October Term, 1911), which said writ was duly granted by the Supreme Court of the United States on the 26th

day of February, 1912, may be taken as and for a return to the said writ.

Dated: New York City, March 4, 1912.

ROLLINS & ROLLINS,
Attorneys for Plaintiff in Error.
STEELE & OTIS,
Attorneys for Defendant in Error.

Endorsed: Thomas vs. Matthiessen. Stipulation. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 4, 1912. William Parkin, Clerk.

101 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed, and certified as a return to the writ of certiorari issued herein.

Dated, New York, March 5th, 1912.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

102 [Endorsed:] 948/23024. United States Circuit Court of Appeals, Second Circuit. Frank N. Thomas v. Conrad H. Matthiessen. Return to certiorari. 1.70.

103 [Endorsed:] File No. 23,024. Supreme Court U. S., October Term, 1911. Term No. 948. Frank N. Thomas, Petitioner, vs. Conrad H. Matthiessen. Writ of certiorari and return. Filed March 8, 1912.

Supreme Court of the United States. 1

FRANK N. THOMAS,
Petitioner,

AGAINST

CONRAD H. MATTHIESSEN,
Respondent.

Term

No.

Notice of Motion.

2

To STEELE & OTIS, Esqs.,
Attorneys for the above named Respondent,
25 Broad Street,
Borough of Manhattan,
New York City.

SIRS:

PLEASE TAKE NOTICE that on Monday, the 5th day of February, 1912, at the opening of court on that day, or as soon thereafter as counsel can be heard, a motion for a writ of *certiorari*, of which motion a copy is hereto annexed, will be submitted to the Supreme Court of the United 3
States at the Capitol in the City of Washington, District of Columbia, for the decision of the Court thereon, and for such further relief in the premises as may be just.

In support of said motion a petition, a copy of which is hereto annexed, and a brief, a copy of which

4 is herewith served upon you, will be presented to the said Court.

Dated at the City of New York, Southern District of New York, January 22, 1912.

Respectfully,

ROLLINS & ROLLINS,
Attorneys for Petitioner,
32 Nassau Street,
Manhattan,
New York City.

ALFRED A. WHEAT,
PHILIP A. ROLLINS,
Counsel for Petitioner.

5

Due and timely service of the foregoing notice of motion, and of the motion, petition and brief in the above cause is hereby admitted this 22nd day of January, 1912.

Respondent by

His Attorneys.

6

SUPREME COURT OF THE UNITED STATES. 7

FRANK N. THOMAS,
Petitioner,

AGAINST

CONRAD H. MATTHIESSEN,
Respondent.

Term
No.
Motion.

8

And now cometh Frank N. Thomas, the above-named petitioner, by Rollins & Rollins, his attorneys; and Alfred A. Wheat and Philip A. Rollins, his counsel, and moves this Honorable Court, upon a certified copy of the transcript of the record herein and upon the annexed petition, for a writ of *certiorari* directed to the Honorable Judges of the United States Circuit Court of Appeals within and for the Second Circuit, to bring before this Honorable Court an action lately before them, wherein Frank N. Thomas was plaintiff and plaintiff-in-error and Conrad H. Matthiessen was defendant and defendant-in-error, for such proceedings therein as to this Court may seem just; and for such other and further relief in the premises as may be just. 9

ALFRED A. WHEAT,
PHILIP A. ROLLINS,
Counsel for Petitioner.

ROLLINS & ROLLINS,
Attorneys for Petitioner,
32 Nassau Street,
Manhattan,
New York City.

10 SUPREME COURT OF THE UNITED STATES.

FRANK N. THOMAS, Petitioner, AGAINST CONRAD H. MATTHIESSEN, Respondent.	Term. No. Petition.

11 TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The petition of Frank N. Thomas for a writ of *certiorari*, directed to the Circuit Court of Appeals for the Second Circuit, to bring before the Supreme Court the case of Frank N. Thomas, plaintiff-in-error (plaintiff below) against Conrad H. Matthiessen, defendant-in-error (defendant below), respectfully shows to this Court as follows:

I.—Your petitioner was at the commencement of this action a citizen and resident of the State of California, and the respondent was at that time a citizen and resident of the State of New York.

12 II.—This action was commenced on or about the 9th day of March, 1908, in the United States Circuit Court for the Southern District of New York and was brought for the purpose of enforcing against the respondent, Conrad H. Matthiessen, as a stockholder of Wentworth Hotel Company, an Arizona corporation, a liability imposed by the laws of the State of California upon stockholders of foreign corporations for debts incurred by such corporations in said State of California while doing business therein.

III.—By the Constitution of California, Article XII, Sections 3 and 15, and by the Civil Code of the

State of California, Section 322, it is provided that each stockholder of a corporation formed under the laws of another State or Territory of the United States and doing business within the State of California shall be individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him at the time said debts and liabilities were incurred bears to the whole of the then subscribed capital stock or shares of the corporation.

IV.—Wentworth Hotel Company is a corporation, organized under the laws of the Territory (now State) of Arizona on or about the 12th day of April, 1906, and its articles of incorporation contain an express provision that the principal place of business of said corporation outside of the Territory of Arizona shall be in the State of California.

V.—Prior to the incorporation of the said Wentworth Hotel Company the respondent, Conrad H. Matthiessen, subscribed a certain writing, containing the following provision:

> "It is proposed by the following subscribers to associate themselves into a corporation under the laws of Arizona for the purpose of acquiring a portion of the OAK KNOLL, containing about twenty-one acres, and building thereon a first-class hotel of about three hundred guest rooms, the total cost of which it is estimated to be about $600,000.00."

The words "Oak Knoll" used in said writing referred to and designated Oak Knoll, situated near Pasadena, in the County of Los Angeles, State of California.

VI.—Subsequent to the incorporation of the said Wentworth Hotel Company the respondent subscribed to one thousand (1,000) shares of the capital stock of said Wentworth Hotel Company at the par

16 value of $100,000, and subsequently paid the full amount thereof in cash to said Wentworth Hotel Company.

VII.—By the statute law of the Territory of Arizona in force at the time said Wentworth Hotel Company was incorporated it was provided that a corporation there organized might exempt its stockholders from personal liability for its debts, by including a statement to that effect in its articles of incorporation. Pursuant to this provision there was embodied in the articles of incorporation of said Wentworth Hotel Company the following clause:

17

> "The private property of the stockholders of this corporation shall be, and is hereby, made forever exempt from all liability for its debts or obligations."

VIII.—After the incorporation of said Wentworth Hotel Company, and prior to the 5th day of October, 1906, said corporation duly complied with the laws of the State of California relating to foreign corporations doing business therein, purchased land in the County of Los Angeles, near the City of Pasadena, erected a hotel thereon, and continued to transact business in the said State of California until the 12th day of July, 1907, when it was adjudged insolvent.

18

IX.—During the period within which said Wentworth Hotel Company was transacting business in the State of California, the debts upon which the present action is based were incurred by said corporation within the State of California, and at the times the debts, upon which the present action is based were incurred, the respondent was the owner and holder of one thousand (1,000) shares of the capital stock of said corporation.

X.—On or about the 21st day of June, 1910, the case came on for trial upon an agreed statement of

facts, without the intervention of a jury, before the 19
Honorable Learned Hand, District Judge of the Southern District of New York, sitting in the Circuit Court for said Southern District of New York, who, on or about the 9th day of December, 1910, filed his decision therein directing that judgment be entered in favor of the respondent dismissing the complaint of your petitioner on the merits, with costs.

XI.—Thereafter and on or about the 24th day of January, 1911, your petitioner was duly allowed by the said Honorable Learned Hand, District Judge for the Southern District of New York, a writ of error from his said judgment to the United States 20
Circuit Court of Appeals for the Second Circuit, and it was ordered that a certified transcript of the record and of all proceedings in the said case be forthwith transmitted to the said United States Circuit Court of Appeals.

XII.—A certified transcript of the record and of all proceedings in the case was duly so transmitted to the said United States Circuit Court of Appeals, and in the October Term of said Court, in the year 1911, A. D., the said writ of error came on to be heard, and was argued by counsel for both parties before Judges Lacombe, Cox and Ward. And thereafter, and on or about the 11th day of Decem- 21
ber, 1911, said Circuit Court of Appeals rendered and filed an opinion and decision, written by Judge Ward, affirming said judgment of said Circuit Court, a copy of which opinion is hereto annexed, made a part hereof and marked "Exhibit A."

XIII.—Thereafter, and on or about the 21st day of December, 1911, a mandate, pursuant to said decision, was duly issued from said Circuit Court of Appeals to said Circuit Court and thereafter, and on or about the 29th day of December, 1911, on motion

22 of counsel for the respondent, an order was duly made by the United States Circuit Court for the Southern District of New York and entered in the office of the Clerk of said Court, directing that the judgment of the Circuit Court of Appeals be made the judgment of said Circuit Court and that the respondent have judgment against your petitioner for the costs as taxed.

XIV.—The question of law to be presented for the consideration of this Honorable Court is as follows:

23 Where articles of incorporation contain a statement that one of the purposes of the corporation is to transact business in a designated State, other than that of its domicil, and where, by the laws of such other State, stockholders of a foreign corporation doing business therein are made personally liable for debts contracted therein by the corporation, can the stockholders be exempted fro.n such liability in the other State by a statement in the articles of incorporation that the stockholders shall not be personally liable for the debts of the corporation?

XV.—In the case of *Pinney* vs. *Nelson*, 183 U. S. 144, this Court held that a stockholder in a Colo-
24 rado corporation, formed for the purpose of transacting business in California, was personally liable under the laws of the latter State for debts incurred by the corporation in the State of California. In that case the freedom of stockholders from personal liability was not expressly declared in the articles of incorporation but arose from the common law of the State of Colorado. In concluding the opinion, Mr. Justice Brewer said:

> "All that we here hold is that when a corporation is formed in one State and by the express terms of its charter it is created for doing business in another State, and business

is done in that State, it must be assumed that the charter contract was made with reference to its laws; and the liabilities which those laws impose may attend the transaction of such business."

XVI.—In the case of *Thomas* vs. *Wentworth Hotel Company*, 158 Cal., 275, which arose out of the identical facts here involved, excepting only that the stockholders against whom recovery was sought in that action were residents of California, the Supreme Court of the State of California, following the decision of this Court in *Pinney* vs. *Nelson*, 183 U. S., 144, held that the stockholders were personally liable for debts incurred by the said Wentworth Hotel Company in the State of California while transacting business therein.

XVII.—Your petitioner further avers that the present case is one in which it is proper for this Court to issue a writ of *certiorari* for the following reasons, among others:

1. Because there is a direct conflict between the decision of said Circuit Court of Appeals in this case and the decision of the Supreme Court of California on the same facts in *Thomas* vs. *Wentworth Hotel Company*, 158 Cal., 275, which followed the rule of this Court in *Pinney* vs. *Nelson*, 183 U. S., 144.

2. Because, in view of the large number of persons holding stock in corporations organized for the purpose of doing business in States other than those wherein said corporations are domiciled, the question of law involved is of such general, national and material importance and interest as to require its determination by the court of last resort.

3. Because either there is no decision of this Court covering the question involved, or else it

28 is covered by the ruling in *Pinney* vs. *Nelson*, 183 U. S., 144, in which latter event the said Circuit Court of Appeals erred in not following said ruling.

WHEREFORE, your petitioner prays that this Honorable Court will be pleased to grant a writ of *certiorari* in this case to the Circuit Court of Appeals for the Second Circuit, to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

ALFRED A. WHEAT,
PHILIP A. ROLLINS,
Counsel for Petitioner.

29 ROLLINS & ROLLINS,
Attorneys for Petitioner,
32 Nassau Street,
New York City.

I hereby certify that I have examined the foregoing petition, and that, in my opinion, the petition is well founded and the case is one in which the prayer of the petitioner should be granted by this Court.

ALFRED A. WHEAT,
Of Counsel for Petitioner.

30

Exhibit A.

31

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

FRANK N. THOMAS,
Plaintiff-in-Error
(Plaintiff below)

AGAINST

CONRAD H. MATTHIESSEN,
Defendant-in-Error
(Defendant below)

32

Before
LACOMBE, COXE and WARD,
Circuit Judges.

WARD, Circuit Judge:

The plaintiff, assignee of a California bank, sues the defendant, a citizen and resident of New York, and a holder of full paid stock of an Arizona corporation, for such proportion of a debt incurred by that corporation in the state of California as his stock in the corporation bears to the whole of its subscribed capital stock.

33

The charter of the Arizona corporation provides that it may carry on the business of building and operating hotels anywhere and that its principal place of business outside of Arizona shall be the city of Pasadena.

The charter was filed in the office of the Secretary of State of California and a person designated upon whom process might be served.

It is stipulated by the parties *inter alia:*

> "That at the time the defendant subscribed for said stock it was the purpose and

34 intent of himself and of the other subscribers for stock in said Wentworth Hotel Company that said company should have the power among others to erect a hotel and engage in the hotel business near the city of Pasadena, in the State of California, and that it would probably erect such a hotel and engage in such business, but it was the purpose and intent of such subscribers that their obligations as such and as stockholders in said company should be controlled and determined by the articles of incorporation of said company and by the laws of Arizona."

The charter further provides:

35 "The private property of the stockholders of this corporation shall be and is hereby made forever exempt from all liability for its debts or obligations."

The ground on which the plaintiff claims to recover is that the constitution of California, Art. XII, Sec. 3, makes stockholders of its own corporations personally liable for the company's debts to this extent, and further provides, Sec. 15, that no corporation organized outside of the state shall be allowed to do business within the state on more favorable conditions than are prescribed by law for its own corporations. Sec. 322 of the Civil Code of California prescribes the manner in which suits against stockholders shall be brought.

36 That the state incorporating a company may by statute impose such liability upon stockholders irrespective of their residence which may be enforced everywhere is well settled. Such a liability though created by statute is of a contractual nature, because those who become stockholders are presumed to have assented to it, *Whitman* v. *The Bank*, 176 U. S., 559, 563. The theory upon which it is sought to recover of the defendant is that he must be presumed to have assented to be bound by the laws of California in respect to any business done by the corporation there and so to have sub-

jected himself to that additional liability. If such 37
an assent may be assumed, then the plaintiff is entitled to recover of the defendant in any court which has jurisdiction of his person, notwithstanding that he is a resident and citizen of the state of New York and that the charter of Arizona does not impose such liability upon him.

The plaintiff relies on the case of *Pinney* v. *Nelson*, 183 U. S., 144, in which just this additional liability under the laws of California was sought to be imposed upon a citizen and resident of California who was a stockholder of a Colorado corporation by the laws of which State there was no personal liability of stockholders. The charter provided that the company was created for the purpose of carrying on 38
part of its business outside of Colorado and principally in California. Nothing was said about the extent of the liability of stockholders.

It is said that this decision being on writ of error to the State court, the only question upon which the Supreme Court passed was the Federal question by virtue of which the cause was brought up, viz., whether the California statute impaired the obligation of the stockholder's contract, deprived him of his property without due process of law and denied him the equal protection of the laws and was therefore unconstitutional. But the reasoning of the Supreme Court disposed of the whole case. Mr. Justice Brewer said: 39

> "Passing to a consideration of the stockholders' contract in the light of the other contention, it may be said that ordinarily it is controlled by the law of the State in which the incorporation is had. That is the place of contract, and, generally the law of the place where a contract is made governs its nature, interpretation and obligation. While this is so, it is also true that parties in making a contract may have in view some other law than that of the place, and when that is so that other law will control. That the parties have some other law in view and contract with

40 reference to it is shown by an express declaration to that effect. In the absence of such declaration, it may be disclosed by the terms of the contract and the purpose with which it is entered into.

. . . . .

"Now, when they in terms specified that they were framing a corporation for the purpose of having that corporation do business in California, is it not clear that they were contracting with reference to the laws of that State? Contracting with reference to the laws of that State, they must be assumed to know the provisions of those laws; that by them a personal liability was cast upon the stockholders in corporations formed under the laws of the State, and that that same liability
41 was also imposed upon the stockholders of corporations formed under the laws of other States and doing business within California. How can it be said that those laws do not enter into the contract and control as to all business done in pursuance of that contract within the limits of California."

And the opinion ended up with this sentence:

"All that we here hold is that when a corporation is formed in one State, and by the express terms of its charter it is created for doing business in another State, and business is done in that State, it must be assumed that the charter contract was made with reference to it laws; and the liabilities which those
42 laws impose will attend the transaction of such business."

It is quite evident that stockholders are bound by the statutes of the incorporation State whether they assent to them or not, and that they are bound by the statutes of another State in which the corporation does business if they have assented to be so bound. Such an assent was found by the Supreme Court in the Pinney case, to be implied from the terms and purpose of the charter, but we do not see how it could be implied if the charter contained an express provision to the contrary.

If a corporation whose stockholders were not personally liable and whose charter said nothing about doing business in California, did do business there, could it be said that the stockholders had assented to be bound by the law of California imposing an additional personal liability? It could hardly be contended that in the language of Mr. Justice Brewer "they were contracting with reference to the laws of that state." 43

Or if a corporation whose stockholders were made personally liable by the incorporating state did business in accordance with the provisions of its charter in another state which prohibited foreign corporations from doing business there except upon the same terms as its own corporations and stockholders of its own corporations were not personally liable, could it be assumed as against their contract that they did not intend to be personally liable upon its contracts made in the non-incorporating state? 44

To arrive at such a result there must be something more than the law of the non-incorporating state. Doubtless it could prohibit a corporation whose charter relieved its stockholders from all personal liability from doing business in the state; could drive it from the state; could penalize it and its officers and agents for attempting to do business in the state, but we do not think it could *ex proprio vigore* make a contract for the stockholders to be bound by its provisions. If it could, corporate stock is liable to become in this country an uncertain and even dangerous asset. In the language of Lord Justice Romer in *Risdon* v. *Furness*, L. R. (1906) 1 K. B. 59: 45

> "I need hardly point out that the shareholder and the company are different entities, and that the judgment obtained abroad is a judgment against the company, which *prima facie* does not affect the shareholder. If the shareholder and the company are treated as different entities the plaintiffs cannot by law enforceable in this country say that the company, trading in California, must, though,

46 without authority from the shareholder, nevertheless be held to have contracted so as to make him liable."

The Risdon case was a suit against a stockholder of an English corporation registered in California and doing business there, to recover his proportion of debts contracted by the company in California. The charter covered the doing of a mining business anywhere in the world and expressly in the United States. The Court held that if the inference could be drawn from the facts in *Pinney* v. *Nelson* that the stockholders had agreed to be bound by the law of California, such inference could not be drawn in
47 the case under consideration. Both courts were inquiring about the stockholders' contract and considering the question of the stockholders' consent. The construction adopted in the Risdon case was more favorable to stockholders than was that of *Pinney* v. *Nelson*, but we do not think the latter requires us to assume an intention upon the part of stockholders which contradicts the express provisions of their charter.

The judgment is affirmed, with costs.

48

Supreme Court of the United States.

FRANK N. THOMAS,
Petitioner,

AGAINST

CONRAD H. MATTHIESSEN,
Respondent.

Term,

No.

PETITIONER'S BRIEF IN SUPPORT OF MOTION FOR WRIT OF CERTIORARI.

POINT I.

This Court has power to grant a writ of certiorari in the present case.

This being a case in which the jurisdiction of the Federal Court depended entirely upon the opposite parties to the controversy being citizens of different States, the judgment of the Circuit Court of Appeals was final.

Judicial Code, Sec. 128.

The power of this Court to grant a writ of *certiorari* under the Judicial Code, Sec. 240, in any case in which the judgment of the Circuit Court of Appeals is made final is too well settled to require discussion.

In *Forsyth* v. *Hammond*, 166 U. S., 506, Mr. Justice Brewer reviewed the history of the statute and the decisions under it, and stated that the power of the Court to issue the writ was undoubted, but that the power would be exercised only where questions of gravity and importance were involved. He said (p. 514):

> "While this power is co-extensive with all possible necessities and sufficient to secure to this Court a final control over the litigation in all the Courts of Appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or *between Courts of Appeal and the courts of a State*, or some matter affecting the interests of this nation in its internal or external relations demands such exercise." (Italics ours.)

In that case the writ was granted on the ground that there was a conflict between the Circuit Court of Appeals and the Supreme Court of Indiana.

POINT II.

The writ should be granted in this case on the ground that there is a direct conflict between the decision of the Circuit Court of Appeals and the decision of the Supreme Court of California on the same facts.

The only difference between the facts of the present case and those in *Thomas* v. *Wentworth Hotel Co.*, 158 Cal., 275, is that here the defendant is a resident of New York, whereas the stockholders sued in the California case were residents of California.

In both cases the plaintiff was the same person and the defendants were stockholders in the same insolvent corporation, the Wentworth Hotel Company.

But the decision of the Circuit Court of Appeals in the present case was in nowise based upon the fact that the defendant was a non-resident of California. The only question considered by the Court was whether the stockholders, when contracting in Arizona, impliedly assented to be bound by the laws of California in respect to any business done by the corporation in that State. And in the course of Judge Ward's opinion it is said:

> "If such an assent may be assumed, then the plaintiff is entitled to recover of the defendant, in any court which has jurisdiction of his person, notwithstanding that he is a resident and citizen of the State of New York and that the charter of Arizona does not impose such liability upon him."

Therefore, it is evident that the question of the stockholder's residence is not material and that, as viewed from a legal standpoint, the two diametrically opposed decisions were based on identical states of facts.

In the present case the Circuit Court of Appeals held that the inclusion in the articles of incorporation of an express declaration that the stockholders should not be personally liable for the debts of the corporation negatived any implied assent to be bound by the laws of California respecting business transacted therein by the corporation, and that the ruling in *Pinney* v. *Nelson*, 183 U. S., 144, did not require the Court "to assume an intention upon the part of stockholders which contradicts the express provisions of their charter."

In *Thomas* v. *Wentworth Hotel Co.*, 158 Cal., 275, 280, on the other hand, the Supreme Court of California held certain stockholders of this same corporation personally liable for debts contracted by

the corporation in that State. In the course of the opinion it was said:

> "It can make no difference that in *Pinney* v. *Nelson* and *Peck* v. *Noee* [154 Cal., 351] the freedom from individual liability was declared by statute or constitution, whereas here it was, under the authority of the statute, declared in the articles. The provision of the articles can have no greater force than is to be attributed to the express law of the State creating the corporation. Such law is, for most purposes, imported into the contract of association and forms a part of it, whether stated in the charter or not."

It may perhaps be urged, however, that, as the State of California is not within the Second Circuit, a conflict between the Supreme Court of California and the Circuit Court of Appeals for the Second Circuit is not sufficient reason for the issuance of a writ of *certiorari*. But we submit that, in principle, exactly the same reasons exist for granting the writ as if the decision had been made by the Circuit Court of Appeals for the Ninth Circuit, which embraces the State of California.

That the respondent was sued in New York was due merely to the fact that he could be served with process there. He might have been sued in California, could service have been made upon him there, and almost certainly there will presently arise a case where a non-resident stockholder of a foreign corporation doing business in California will be served in California with process from a State court. Then, if the amount in controversy happens to be too small to authorize removal to a Federal court, he will be held liable under the rule laid down by the Supreme Court of California in *Thomas* v. *Wentworth Hotel Co.*, *supra*. If, however, the amount involved chances to be great enough to give the stockholder access to the Federal courts, he can escape liability under the decision of the Circuit Court of Appeals in the present case—unless the

Federal court sitting in California ignores that decision and adopts the doctrine of the California court.

If it would have been proper to grant a writ of *certiorari*, had this decision been made by the Circuit Court of Appeals for the Ninth Circuit, then it is equally proper to grant the writ under the present circumstances. The ruling of this Court in *Forsyth* v. *Hammond*, 166 U. S., 506, applies with equal force in either case.

Practically the same reasons for granting the writ exist in the present instance as in a case of conflicting decisions on the same question in Circuit Courts of Appeals for different circuits, and this Court will grant the writ on the ground of such a conflict.

Expanded Metal Co. v. *Bradford*, 214 U. S., 366.

POINT III.

The question involved in this case is one of sufficient gravity and importance to justify the granting of a writ of certiorari.

It is the practice of this Court to grant the writ where not only the private interests of the parties, but also the greater interests of the public, require that the questions be settled.

St. Louis, etc., R. Co. v. *Wabash R. Co.*, 217 U. S., 247.

And, independently of the question of conflicting decisions, it is sufficient ground for granting the writ that the case appears to be one of sufficient importance to demand examination by this Court.

Montana Min. Co. v. *St. Louis Min. Co.*, 204 U. S., 204.

That the question here involved is one of gravity and importance is, we believe, self-evident. In recent years corporations organized outside the States in which their real business is to be transacted have multiplied rapidly, and, on the one hand, we find a large class of persons who, as stockholders, are concerned to know whether or not they can be held personally liable for the debts of the corporation, while, on the other hand, the creditors of such corporations are equally anxious to ascertain the extent to which they can rely upon a stockholder's liability created by State law. Moreover, a final determination of the question is of substantial importance to the States themselves. The decision of the Court below in effect renders null and void long existing provisions of the Constitution and statutes of California as to all persons not residents of that State. The liability thus imposed by the State is, concededly, contractual and not penal, and the laws themselves have been held by this Court to be constitutional (*Pinney* v. *Nelson*, *supra*). The practical efficiency of the State's valid laws, over a subject within the State's legitimate control is thus substantially diminished and the sovereignty of the State practically, to that extent, impaired. Therefore, though not strictly and literally Federal, yet in substance the question may well be considered as *quasi*-Federal. Reduced to its last analysis, it is: May one defy the stockholders' liability laws of California if he can invoke the jurisdiction of a court of the United States?

Nor is the question one of limited local interest. Cases under the California statute are likely to arise at any time in any jurisdiction. For instance, such a case has already required serious consideration from the English courts. In *Risdon Iron & Locomotive Works* v. *Furness*, L. R. (1906), 1 K. B., 49, an action was brought against an English stockholder of an English corporation to enforce the liability imposed by the California statute.

And, if for no other reason, this Court should take

jurisdiction in order to correct the unjust discrimination that now exists between stockholders residing in the State where the corporate debts were created and those residing elsewhere. All of the stockholders of a corporation make the same contract and the liability of each, under such contract, should be the same. But under the present state of the decisions, if a stockholder chances to be a resident of the State in which the foreign corporation transacts its business, he may be held personally liable in the State courts for the debts of the corporation, whereas, if he happens to reside in another State, and is thus given access to the Federal courts, he can (according to the decision in this case) escape liability on the same state of facts. Of the stockholders of the Wentworth Hotel Company, those over whom the California courts have obtained jurisdiction have been condemned to pay their proportionate share of the corporate debts, while those who are so fortunate as to be citizens of other States cannot be held liable, if the decision of the Circuit Court of Appeals in this case be allowed to stand.

POINT IV.

Either there is no decision of this Court covering the question involved, or else it is covered by the ruling in Pinney v. Nelson, 183 U. S., 144, in which event the Circuit Court of Appeals erred in not following that ruling.

In *Pinney* v. *Nelson*, this Court held that where a corporation was organized for the expressly declared purpose of transacting business in another specified State, the stockholders impliedly agreed to

assume a personal liability imposed by the laws of such other State, so far as related to business transacted therein, notwithstanding the stockholders were exempt from personal liability under the laws of the State of incorporation.

In the Circuit Court of Appeals we endeavored to show that, on principle, the present case was indistinguishable from *Pinney* v. *Nelson*, but that learned Court held that the inclusion in the articles of incorporation of an express declaration that there should be no personal liability on the part of stockholders distinguished the two cases, and consequently the ruling in the *Pinney* case did not require the Court " to assume an intention upon the part of stockholders which contradicts the express provisions of their charter."

But we submit that there is nothing in *Pinney* v. *Nelson* to warrant the conculsion that the decision was grounded on a presumption that the stockholders *intended* to assume liabilities imposed by the laws of California. The only *intent* required by the rule there announced is the expressed intent that the corporation shall transact business in a designated foreign State. This intent having been expressed by the stockholders, *the law* reads into their contract an agreement to assume such liability as is imposed by the law of the named State, so far as relates to business transacted therein by the corporation. The concluding paragraph of the opinion in *Pinney* v. *Nelson* is as follows (p. 151):

> " All that we here hold is that where a corporation is formed in one State and by the express terms of its charter, it is created for doing business in another State, and business is done in that State, it must be assumed that the charter contract was made with reference to its laws; and the liabilities which those laws impose will attend the transaction of such business."

Nowhere in the opinion does this Court rely upon an *intent* of the stockholders to be governed by the

California law. The language used is that, under the given circumstances, the contract must be presumed to have been made "with a view to" or "with reference to" that law. In other words, the Court inferred a *legal* intent to be bound by the California law, which could not be contradicted by showing that the *actual* intent was otherwise.

Nor is there anything said in *Pinney* v. *Nelson* from which it may be inferred that the holding would have been different had the exemption of stockholders from personal liability been established by an express provision in the charter rather than by the general law of the State of incorporation. The ruling in that case appears to have been based not at all on the absence of a declaration of freedom from personal liability, but altogether on the presence of an express declaration that the corporation was to transact business in California. By the common law of the State of incorporation stockholders were exempt from liability for the debts of the corporation and that law entered into the charter contract as fully as if it had been expressly declared therein. As was said by the California Court in *Thomas* v. *Wentworth Co.*, 158 Cal., 275, 280:

> "The provision of the articles can have no greater force than is to be attributed to the express law of the State creating the corporation. Such law is, for most purposes, imported into the contract of association and forms a part of it, whether stated in the charter or not."

Apparently the decision of the Circuit Court of Appeals was influenced by the English case of *Risdon Iron & Locomotive Works* v. *Furness*, L. R. (1906), 1 K. B., 49, which was an action against a stockholder of an English corporation to recover his proportion of debts contracted by the corporation in California. But in that case there was lacking the principal factor on which the decision in *Pinney* v. *Nelson* was based—there was no declaration in the charter of a purpose to do business in California—and Collins, *M. R.*, expressly stated that the hold-

ing was not in conflict with *Pinney* v. *Nelson*. Alluding to that decision, he said (p. 58):

> "By the constitution of the company in that case there were provisions out of which the Court inferred that there was an express agreement, to which all the shareholders must be taken to be parties, that the business of the company should be conducted in a named and foreign state. The inference of fact was that every person who could be said to be a party to the initiation and incorporation of that company must be taken to have authorized the company to trade in California, that being the special object with which the company was incorporated. That was the inference of fact that was drawn. It is not for us to canvass whether it was rightly drawn or not in that case. In the case before us there is a complete absence of the materials on which the inference was drawn in that case."

POINT V.

Upon the foregoing reasons we respectfully ask that this Honorable Court will grant a writ of certiorari to review the decision of the Circuit Court of Appeals herein.

Dated, January, 22, 1912.

Respectfully submitted,

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(2901)

~~No. 840.~~ 13

Supreme Court of the United States,

~~171~~ TERM

No. ~~525~~

FRANK N. THOMAS,
Petitioner,

against

CONRAD H. MATTHIESSEN,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO MOTION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States,

No. ——

FRANK N. THOMAS,
Petitioner,

against

CONRAD H. MATTHIESSEN,
Respondent.

On Petition for Writ of Certiorari.

Brief for Conrad H. Matthiessen, respondent, in opposition to the granting of the writ.

The action was at law to charge the respondent, a citizen and resident of New York, and a stockholder in the Wentworth Hotel Company, an Arizona corporation, with liability under the California statutes for a proportionate part of that Company's indebtedness.

A jury was waived and the facts were stipulated and found by the trial court. On these findings the complaint was dismissed.

The plaintiff's claim was that under the constitution and laws of California purporting to im-

pose a liability upon stockholders in foreign corporations doing business in the State, for their respective proportions of the debts of the company, Mr. Matthiessen, a non-resident of the State, and a stockholder in an Arizona corporation, could be charged for debts of the company contracted in California, even though under the laws of Arizona where the Company was organized and by virtue of a provision of the Company's charter, the stockholders were exempted from any personal liability for its debts.

The certificate of incorporation of the Wentworth Hotel Company, the terms of which were found by the court (Record, fols. 148; 61-80), expressly provided, in accordanec with the Arizona law, that the capital stock of the corporation should be "forever non-assessable by this corporation for any purpose" and that "the private property of the stockholders of this corporation shall be and is hereby made forever exempt from all liability for its debts or obligations" (Rec., fols. 77-78).

The Trial Court also found in accordance with the agreed statement of facts that the defendant subsequent to the incorporation of the company had subscribed for one thousand shares of its capital stock and paid therefor the full par value of $100,000 in good faith, and

> "That at the time the defendant subscribed for said stock it was the purpose and intent of himself and of the other subscribers for stock in said Wentworth Hotel Company that said Company should have the power among others to erect a hotel and engage in the hotel business near the City of Pasadena in the State of California, and that it would probably erect such a hotel and engage in said business, *but it was the purpose and intent*

of said subscribers that their obligations as such and as stockholders in said Company should be controlled and determined by the articles of incorporation of said company and by the laws of Arizona" (Rec., fols. 153-54).

The Court also found as stipulated that at the time of the defendant's subscription and payment for his stock he agreed with the company and the incorporators and stockholders that such stock

> "Should be forever non-assessable by said corporation for any purpose and that the defendant and his property should be exempt from all liability for its debts or obligations and that neither said corporation nor its officers or agents should have power to subject the defendant or the other stockholders of said corporation to any personal liability for any debts or obligations of said company" (Rec., fols. 154-55).

The defendant had no notice or knowledge of any provisions of the laws of California purporting to impose any personal liability on stockholders in foreign corporations doing business in that State, but was advised and believed that by his subscription he would assume no such personal liability, and he subscribed and paid for his stock in reliance upon his agreement with the corporation, its incorporators and stockholders and upon the provisions of the certificate of incorporation and of the laws of Arizona (Rec., fols. 155-56).

POINTS.

I.—The decision of the Court upon the agreed facts was correct, and does not conflict with the decision in Pinney v. Nelson, 183 U. S., 144.

The *Pinney* case which was plaintiff's chief reliance below is we submit clearly distinguishable from the present.

The question *decided* in that case was merely whether the California statute was in violation of the provisions of the Constitution of the United States when enforced by the California Court against a California resident who had subscribed for stock in a foreign corporation many years after the statute was passed.

The Court it is true there discussed the effect of an express provision in the corporate charter that the company "is created for doing business in another state" as indicating an intent or justifying the assumption that such a charter contract is made with reference to the laws of such other state and the liabilities which those laws impose. But that discussion was with reference to the inferences of fact to be drawn from the provisions of the charter there under consideration, and the statement of the court which counsel relies upon (Petitioner's Brief, p. 8), we submit, is properly to be so construed and is not here controlling.

Our arguments in support of these contentions we need not repeat in detail. We refer to our brief below, copies of which are filed in connection with this brief (see Respondent's brief in Circuit Court of Appeals, Point I, pages 12-24; Point III, pp. 32-55).

The Court below considered that what was said in the *Pinney* case was not applicable to the present. After quoting from the opinion in that case, the Court said, per Ward, J., (Petition for Certiorari, Ex. A, fols. 42-47):

> "It is quite evident that stockholders are bound by the statutes of the incorporation state whether they assent to them or not and that they are bound by the statutes of another state in which the corporation does business if they have assented to be so bound. Such an assent was found by the Supreme Court in the *Pinney* case to be implied from the terms and purposes of the charter, but we do not see how it could be implied if the charter contained an express provision to the contrary.
>
> If a corporation whose stockholders were not personally liable and whose charter said nothing about doing business in California, did do business there, could it be said that the stockholders had assented to be bound by the law of California imposing an additional personal liability? It could hardly be contended that in the language of Mr. Justice Brewer 'they were contracting with reference to the laws of that state.'
>
> Of if a corporation whose stockholders were made personally liable by the incorporating state did business in accordance with the provisions of its charter in another state which prohibited foreign corporations from doing business there except upon the same terms as its own corporations, and stockholders of its own corporations were not personally liable, could it be assumed as against their contract that they did not intend to be personally liable upon its contracts made in the non-incorporating state?
>
> To arrive at such a result there must be something more than the law of the non-incorporating state. Doubtless it could pro-

hibit a corporation whose charter relieved its stockholders from all personal liability from doing business in the state; could drive it from the state; could penalize it and its officers and agents for attempting to do business in the state, but we do not think it could *ex proprio vigore* make a contract for the stockholders to be bound by its provisions. If it could, corporate stock is liable to become in this country an uncertain and even dangerous asset. In the language of Lord Justice Romer in *Risdon* v. *Furness*, L. R. (1906), 1 K. B., 59:

> 'I need hardly point out that the shareholder and the company are different entities, and that the judgment obtained abroad is a judgment against the company, which *prima facie* does not affect the shareholder. If the shareholder and the company are treated as different entities the plaintiffs cannot by law enforcible in this country say that the company, trading in California, must, though without authority from the shareholder, nevertheless be held to have contracted so as to make him liable.'

The Risdon case was a suit against a stockholder of an English corporation registered in California and doing business there, to recover his proportion of debts contracted by the company in California. The charter covered the doing of a mining business anywhere in the world and expressly in the United States. The Court held that if the inference could be drawn from the facts in *Pinney* v. *Nelson* that the stockholders had agreed to be bound by the law of California, such inference could not be drawn in the case under consideration. Both courts were inquiring about the stockholders' contract and considering the question of the stockholders' consent. The construction adopted in the Risdon case was more favorable to stockhold-

> ers than was that of *Pinney* v. *Nelson*, but we do not think the latter requires us to assume an intention upon the part of the stockholders which contradicts the express provisions of their charter."

Counsel for petitioner argues (Brief, pp. 8-9) that the question dealt with in the *Pinney* case was not one of actual intent to contract with reference to the laws of California or of an intent to be presumed as an inference of fact from the acts of the parties and upon a fair construction of the articles, but a "*legal intent*" which the court is bound to infer from the mere fact that the certificate of incorporation expressed an intent "that the corporation shall transact business in a designated foreign State" (Brief, p. 8).

We submit that this construction of the Court's opinion in the *Pinney* case is not correct. The Court there dealt with the matter as one of fair inference of the intent of the parties as expressed or to be inferred from their acts.

Thus, after referring to the rule that a stockholder's contract is usually controlled by the law of the State of the incorporation the Court said (183 U. S., on p. 148):

> "That is the place of contract, and, generally the law of the place where a contract is made governs its nature, interpretation and obligation. While this is so it is also true that parties in making a contract may have in view some other law than that of the place, and when that is so the other law will control. That the parties have some other law in view and contract with reference to it is shown by an express declaration to that effect. In the absence of such declaration it may be disclosed by the terms of the contract and the purpose with which it is entered into."

The Court cites with approval the leading case of *Pritchard* v. *Norton*, 106 U. S., 124, quoting from the opinion in that case as follows (183 U. S., on p. 148):

> "The law we are in search of, which is to decide upon the nature, interpretation and validity of the engagement in question is that which the parties have, either expressly or presumptively incorporated into their contract as constituting its obligation. It has never been better described than it was incidentally by Mr. Chief Justice Marshall, in *Wayman v. Southard*, 10 Wheat. 1, 48, where he defined it as a principle of universal law, 'The principle that in every forum a contract is governed by the law with a view to which it was made'. The same idea had been expressed by Lord Mansfield in *Robinson v. Bland*, 2 Burr, 1077, 1078, 'the law of the place', he said, 'can never be the rule where the transaction is entered into with *an express* view to the law of another country, as the rule by which it is to be governed'. And in *Lloyd v. Guibert* L. R. 1 Q. B. 115, 120, in the Court of Exchequer Chamber, it was said that 'it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather by what general law it is just to presume that they have submitted themselves in the matter'. *LeBreton v. Miles*, 8 Paige (N. Y.), 261".

The Court did not indicate that it disapproved of or called in question the further rule stated by this Court in *Pritchard v. Norton*, 106 U. S. 124 on p. 137 (quoting from Phillimore):

> "As all the foregoing rules rest upon the presumption that the obligor has voluntarily submitted himself to a particular local law,

> that presumption may be rebutted either by an express declaration to the contrary, or by the fact that the obligation is illegal by that particular law, though legal by another. *The parties cannot be presumed to have contemplated a law which would defeat their engagements.*" (Italics ours.)

And in considering the effect of the provisions of the certificate of incorporation there under consideration, the Court also dealt with the matter as one of fair inference to be drawn from the terms of the certificate. The Court said (*ibid* p. 150):

> "Now when they in terms specified that they were framing the corporation for the purpose of having that corporation do business in California is it not clear that they were contracting with reference to the laws of that State?"

The statement of the Court upon which petitioner relies that "when a corporation is formed in one state and by the express terms of its charter it is created for doing business in another state and business is done in that state it must be assumed that the charter contract was made with reference to its laws" (183 U. S. on p. 151), should, we submit, be construed with reference to the context and the facts of the case then under consideration. It is to be understood, we submit, as referring to the inference of fact which in a particular case or upon a particular certificate of incorporation the court would be justified or required to draw from the provisions of the certificate showing an *intent* of the incorporators to contract with reference to the laws of the foreign state. We do not understand

that the court there intended to lay down any rule of law that, in a different case, where, upon a fair construction of the articles of incorporation, it is apparent that the incorporators intended their obligations to be governed by the laws of the incorporating state, and where that is stipulated and found as a fact, the court is nevertheless *required* to hold that merely because among its other powers the corporation is given *power* to conduct business and have a place of business in California, the incorporators necessarily contracted with reference to the laws of that state and assumed an obligation under those laws inconsistent with the provisions and limitations expressly provided for in the charter.

Counsel for petitioner (Brief p. 8), referring to the language of the *Pinney* case, says:

> "The only intent required by the rule there announced was the express intent that the corporation shall transact business in the designated foreign city. This intent having been expressed by the stockholders the *law* reads into their contracts an agreement to assume such liability as is imposed by the law of the named state so far as relates to business transacted therein by the corporation."

This, we submit, is unsound. We may properly ask *what law* reads any such provision into the contract. Certainly not the law of Arizona where the company was incorporated. For under the permission accorded by those laws the stockholders by the charter were exempted from any liability to creditors and the stock was full paid and non-assessable.

Nor can the *law* of California read into the charter an obligation of stockholders toward California creditors. The charter contract was made and first became effective in Arizona upon the filing of the articles. Mr. Matthiessen when he subscribed for his stock was not a resident or citizen of California or subject to its jurisdiction and the law of California could not reach out into Arizona to read into his subscription contract with the Arizona Company or into the charter of that company, any obligation which, as a matter of fact, Mr. Matthiessen and the other subscribers or stockholders did not assent to or intend to assume.

Nor, when the Company later filed its charter and entered upon its business enterprise in California, did Mr. Matthiessen become subject to its laws or to any penalty or obligation which those laws purported to impose upon him (see Respondent's Brief below, pp. 29-32, 43-44).

As to the defendants in the *Pinney* case, all residents and citizens of California, that State could perhaps impose such obligations by reason of their acts in taking stock in a foreign corporation, as it saw fit. Any such obligations would be rather penal than contractual in nature. But certainly those laws cannot be effective to fasten an obligation upon a non-resident stockholder of a foreign corporation unless it can fairly be inferred upon a proper construction of the charter of the Company that the stockholder, either expressly or by fair implication, agreed and intended to assume the liability. If this be not the case no contractual obligation can exist enforcible in a foreign jurisdiction.

In the present case the Court would not have been justified in assuming that Mr. Matthiessen and the other incorporators and stockholders contracted "with a view to" the laws of California or that the charter of the Wentworth Hotel Company was made with reference to those laws.

In its facts the case differs radically from the *Pinney* case. There the Company, described as the "Los Angeles Iron & Steel Company," was incorporated in Colorado and the only part of the certificate of incorporation which was before the court or considered was the seventh provision of its articles, quoted in 183 U. S., p. 145, which included the provision:

> "The said Company is created for the purpose of carrying on part of its business beyond the limits of the State of Colorado. * * * and the principal plant and principal operations of said Company beyond the limits of the State shall be in Los Angeles County, State of California, and such other places in the State of California as may be decided upon by the Board of Directors."

All the defendant stockholders in that case were found to have been at all times residents and citizens of that State.

In the present case the charter did not provide that the Company was "created for the purpose" of doing business in California. It provided for the principal place of business in Arizona, and with reference to California provided that

> "The principal place of said corporation, outside the Territory of Arizona, shall be in the City of Los Angeles, in the State of California, with the power in the Board of Directors to change the principal place of busi-

ness of said corporation, outside of the Territory of Arizona, from the City of Los Angeles to the City of Pasadena, if in their judgment they should so elect, at which place, when so elected, meetings of stockholders and of the Board of Directors may be held, and that the corporation may have such branch offices either within or without the Territory of Arizona as may be established by its Board of Directors" (Trans. of Rec., fols. 64-65).

But the articles provided that the incorporators associated themselves together "*for the purpose of forming a corporation under the laws of the Territory of Arizona*" (Rec., fol. 63). They provided that the Company should have the power among others;

(a) to buy and sell real property "anywhere that its Board of Directors may elect" and to conduct the business of hotel keeping (Rec., fol. 65);

(b) To build and acquire, etc., and operate gas or electric works in Arizona or California, "*or elsewhere that may be determined by its Board of Directors*" (Rec., fol. 66);

(c) To build, acquire and operate, etc., water works and "to take up and appropriate the same under the laws of the Territory of Arizona or of any state, territory or colony of the United States, and in all foreign countries and places" (Rec., fol. 687);

The charter provided that the Board of Directors might make such rules and regulations for the management of the Company's affairs as they might deem necessary, "*consistent with*

these articles of incorporation and in accordance with the laws of the United States and the laws of the Territory of Arizona" (Rec., fol. 75). And it provided, as permitted by the laws of Arizona (Laws of Arizona, 1903, No. 88, Sec. 7), that the stock to be issued should be fully paid up and non-assessable (Rec., fols. 71, 77) and that the private property of the stockholders of the Company should be "forever exempt from all liability for its debts or obligations" (Rec., fol. 77).

These provisions for limited liability were valid under the Arizona law, but would not have been valid if inserted in the charter of a California company.

We submit that it could not fairly be inferred or assumed that this charter, containing these provisions, was made "with reference to" the laws of California and that the Court could not, at least as against Mr. Matthiessen, a non-resident of California, have "read into the contract" any actual or "*legal* intent" on his part to be bound under the California law to respond to California creditors for the Company's obligations.

But this question, we submit, is conclusively determined by the special finding of the Trial Court with reference to the intent of the respondent and other subscribers that

> "it was the purpose or intent of such subscribers that their obligations as such and as stockholders of the said Company should be controlled and determined by the articles of incorporation of said Company and by the laws of Arizona" (Rec., fols. 153-154; and see fols. 154-157).

This is a finding of *ultimate* fact and no inferences or assumptions to the contrary are permissible. It is obviously correct upon a fair construction of the charter, but in any event it is conclusive. Neither the Trial Court nor an Appellate Court could in the face of this conceded fact have inferred or found that the incorporators or subscribers contracted "with a view to" or "with reference to" the laws of California or intended that their rights and obligations should be governed by those laws or that they should assume any liability thereunder to California creditors.

As this Court (per Mr. Justice Miller), said with reference to such a special finding in *Norris* v. *Jackson,* 9 Wall., 125, on p. 127:

> "It is not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes and not the evidence on which those ultimate facts are supposed to rest.
>
> The next thing to be observed is that whether the finding be general or special, it shall have the same effect as the verdict of a jury; that is to say, it is conclusive as to the facts so found."

And see,

Miller v. *Life Insurance* Co., 12 Wall. 285, 297.

Collins v. *Riley,* 104 U. S. 322, 327.

Upon this record there is no basis for any inference or conclusion that Mr. Matthiessen or the other subscribers ever expressly or impliedly

consented to be bound by the California law or to assume any obligations thereunder. And in the absence of such a consent it cannot be held that he came under or assumed any "contractual obligation" to the petitioner which could have been enforced below (see Respondent's Brief below, Point II, pp. 25-32).

We submit that the case was correctly decided upon the facts as found, that the decision on these facts in no way conflicts with what was decided or said in *Pinney* v. *Nelson* and that that decision affords no ground for the granting of the writ.

II.—The decision of Thomas V. Wentworth Hotel Company 158 Cal. 275, affords no sufficient ground for the granting of the writ.

That was a case in a California court against a citizen and resident of the State. The facts found as to the intent of the incorporators were not so far as appears the same as here. The court there seems to have held that the charter of the Wentworth Hotel Company was made "with reference to" the California law and the court said that the fact that a corporation is formed in one State with the purpose of doing business in another justifies "the assumption that with regard to the business to be done in such other State the corporators agree to be bound by its laws" (158 Cal. 275, on p. 281).

The Court did not hold that as matter of law a stockholder could be charged, without proof that

he had in fact expressly or impliedly agreed to assume the liability. It differed from the court below in the present case only in its views or conclusions as to the proper inference of fact to be drawn from the proofs, and as to the proper construction to be put upon this particular certificate of incorporation. And even upon that question it does not appear that the facts shown in the California case were the same as those disclosed and found in the present record, or that there was in that case any finding that the incorporators intended their obligations to be governed by the laws of Arizona.

In short the diversity of decision is not due to any difference of view as to the law governing the cases but to a difference in the proofs or in the views of the respective courts as to what fairly should be inferred to have been the intent of the incorporators upon a construction of the charter in question.

A difference in decisions, depending upon a difference of opinion upon matters of fact, is not, as we understand the rule, a sufficient ground for a review of one of the decisions upon certiorari.

Moreover, we submit that the case is not one where the decision of the California court upon a question of the liability of one of its own citizens under this statute, should be adopted or deferred to in determining the liability of a non-resident of California and the enforcement of the laws of that State as against him in another jurisdiction.

California may perhaps determine to penalize its own citizens who take stock in foreign corporations doing business in the State. And in charging them with liability its courts need not consider too carefully whether a true contractual

relationship exists. But when it is claimed that a non-resident, as the result of acts performed without the State of California, can be sued anywhere, under the California statutes, the Court should consider more carefully the sufficiency of the proofs claimed to show the existence of an agreement to be bound by them. And the foreign court is not and should not be required necessarily to adopt the same view of the facts or the same construction of the provisions of a particular charter of incorporation, which the California court, anxious to enforce what it conceives to be the public policy of its State, may conclude to adopt.

The correctness of the decision below must be considered and determined with reference to the record here before the Court and the findings, which the Trial Court made. That decision, we submit, is clearly correct. And whether the California court, upon different facts or upon a different construction of the charter of the Company, has reached a different conclusion is quite immaterial.

III.—The case is not one involving questions of sufficient gravity and importance to justify the granting of the writ.

As we have seen, the case involves and the decision below has turned upon the proper construction of the articles of incorporation of the Wentworth Hotel Company and upon a determination

as to whether the incorporators of that Company and Mr. Matthiessen contracted with reference to the laws of California and impliedly assumed the obligations prescribed by those laws.

These questions have been disposed of by the lower courts as questions of fact dependent upon the correct construction of the charter and upon the finding of the intent of the incorporators to be bound by Arizona law.

Had the court below, notwithstanding the findings, held that the mere fact that the charter authorized the Company to maintain an office and do business in California, rendered all stockholders in that Company, resident and non-resident, subject to the provisions of the California law and liable under those laws to the Company's creditors, it might well be considered that such a decision would have been important and far-reaching. Such a holding would in effect have been that the laws of California could be made effective against non-residents not subject to the jurisdiction of that State, to create an obligation enforcible against them regardless of their assent or of the finding of any elements of a contractual relationship. But the decision as it stands merely confirms the rule that the liability of a stockholder in a corporation to its creditors is contractual in nature, and that if the elements of contract do not exist no such liability can be found. The principles of law applied by the Court are familiar and the correctness of its conclusions upon the facts found cannot be disputed.

Such a case, we submit, does not, within the rule, involve questions of such gravity and importance as to justify the granting of the writ.

United States v. *Rimer*, 220 U. S. 547.
In re Woods, 143 U. S. 202, 206.
Lau Ow Ben, Petitioner, 141 U. S. 583, 587.
Fields v. United States, 205 U. S. 292.
Forsyth v. *Hammond*, 166 U. S. 506, 513-514.

IV.—The petition should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1919.

No. 171

FRANK N. THOMAS,
Petitioner,

vs.

CONRAD H. MATTHIESSEN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

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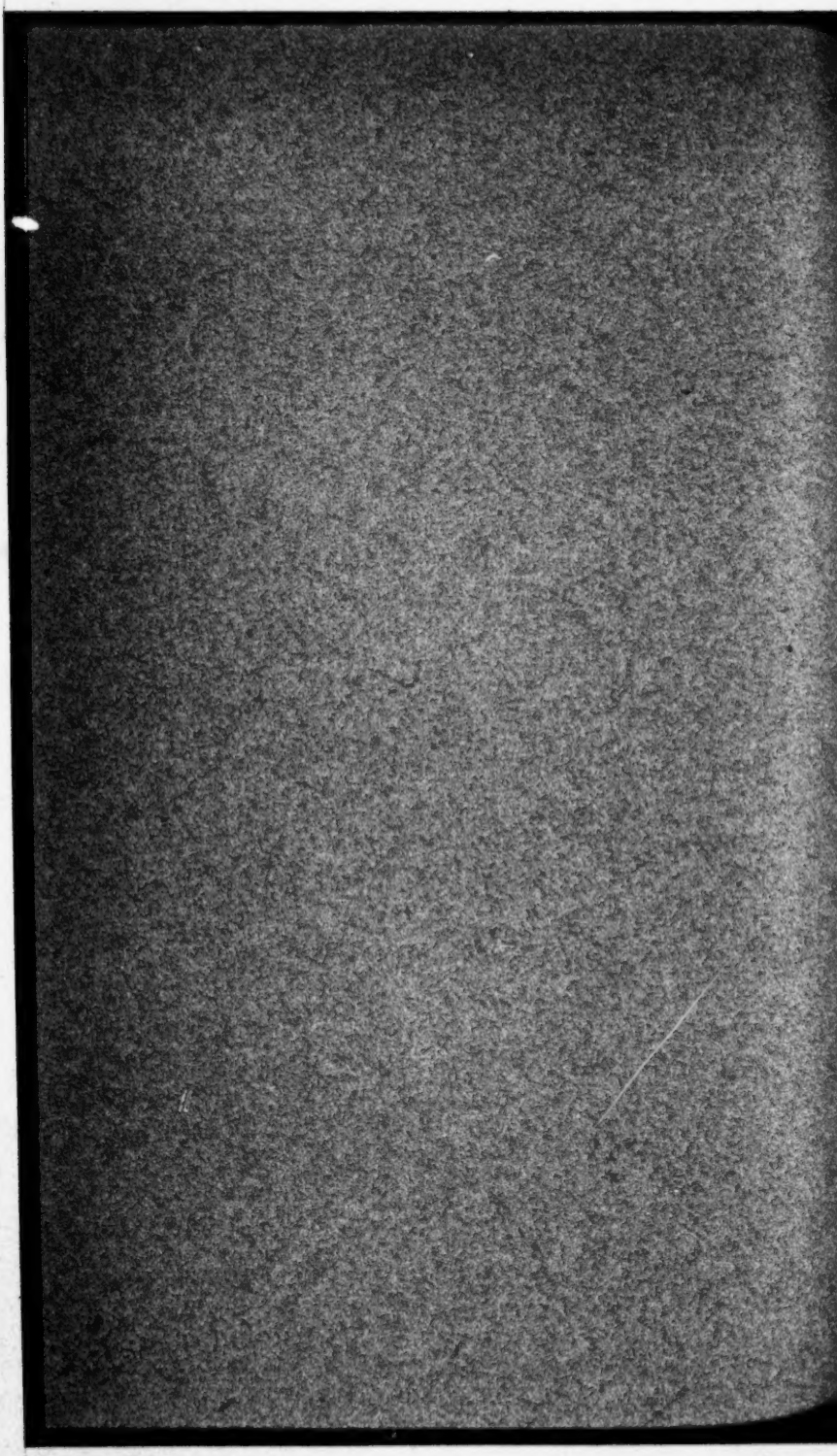

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Authorities Cited.

Supreme Court of the United States.

FRANK N. THOMAS,
Petitioner,
(Plaintiff below),

against

CONRAD H. MATTHIESSEN,
(Defendant below).

BRIEF FOR PETITIONER.

Statement.

The case comes before this court on writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit, which court affirmed a judgment of the Circuit Court of the United States for the Southern District of New York dismissing the complaint upon the merits.

The action was brought to enforce the individual liability of a stockholder imposed by the Constitution and Statutes of the State of California.

Facts.

The plaintiff, a citizen of the State of California, brings this action against the defendant, a citizen of the State of New York, and seeks to re-

cover a sum of money evidenced by two promissory notes of the Wentworth Hotel Company, an Arizona corporation, upon the ground that the debts evidenced by the notes were contracted in the State of California, and that the defendant was a stockholder in said corporation at the time that the debts were contracted.

The case was heard upon an agreed statement of facts and a jury was by written stipulation waived. The court made special findings of fact and the bill of exceptions raises the broad question as to which party is entitled to judgment.

On October 5th, 1906, at Pasadena, in the State of California, the First National Bank of Pasadena, a national banking association, loaned to the Wentworth Hotel Company, referred to herein as the corporation, Twenty-two thousand five hundred dollars ($22,500), in consideration of which the corporation made and delivered its note, dated October 5, 1906, whereby it promised to repay the amount, and also to pay an attorney's fee to be fixed by the court if suit should be instituted on the note (page 31).

On November 16th, 1906, at Pasadena, the Union Savings Bank of Pasadena loaned to the corporation Twenty-five thousand dollars ($25,000), in consideration of which the corporation made and delivered its note, dated November 16, 1906, whereby it promised to repay the amount, together with an additional sum of ten per cent. (10%) attorney's fees, if the note should be placed in the hands of an attorney for collection (pages 31, 32).

The notes have not been paid, although demand for payment has been duly made, and the plaintiff is now the owner and holder thereof.

The Wentworth Hotel Company was a corporation organized under the laws of Arizona (page 28) and a true copy of its certificate of incorporation is annexed to the answer, marked "Exhibit A," and is set forth in the record, beginning with page 12.

In the certificate it was provided that "the principal place of business of said corporation outside of the Territory of Arizona, shall be in the City of Los Angeles, in the State of California, with the power in the Board of Directors to change the principal place of business of said corporation outside of the Territory of Arizona, from the City of Los Angeles to the City of Pasadena."

The general nature of the business to be transacted by the corporation as set forth in the certificate was, among other things, to build, maintain, operate and carry on in all its branches the business of hotel keeping.

The subscription agreement, signed by the defendant, discloses that the defendant with others formed the corporation for the purpose of acquiring a portion of "Oak Knoll" in Pasadena and of building thereon a hotel (pages 28, 29).

At the time the corporation delivered these notes the subscribed capital stock of the corporation was Three hundred and fifty thousand dollars ($350,000), of which the defendant owned One hundred thousand dollars ($100,000) (page 32).

When these notes were made by the corporation and while the defendant was a stockholder therein section 3 of Article XII of the Constitution of the State of California provided as follows:

> "Each stockholder of a corporation, or joint stock association, shall be individually and personally liable for such propor-

tion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association,"

and section 15 of Article XII provided:

"No corporation organized outside the limits of this State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State."

To give effect to these provisions, the Legislature enacted section 322 of the Civil Code as follows:

"Each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like proportion only of each debt or claim against the corporation. Any creditor of the corporation may institute joint or several actions against any of its stockholders, for the proportion of his claim payable by each, and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered against each, in conformity therewith. If any stockholder pays his proportion of any debt due from the corporation, incurred while he was such stockholder, he is relieved from any further personal liability for such debt, and if an action has been brought against him upon such debt, it shall be dismissed, as to him, upon his paying the costs, or such proportion thereof as may be

properly chargeable against him. The liability of each stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred; and such liability is not released by any subsequent transfer of stock. The term stockholder, as used in this section, shall apply not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appear on the books in the name of another; and also to every person who has advanced the installments or purchase money of stock in the name of a minor, so long as the latter remains a minor; and also to every guardian, or other trustee, who voluntarily invests any trust funds in the stock. Trust funds in the hands of a guardian, or trustee, shall not be liable under the provisions of this section, by reason of any such investment; nor shall the person for whose benefit the investment is made be responsible in respect to the stock until he becomes competent and able to control the same; but the responsibility of the guardian or trustee making the investment shall continue until that period. Stock held as collateral security, or by a trustee, or in any other representative capacity, does not make the holder thereof a stockholder within the meaning of this section, except in the cases above mentioned, so as to charge him with any proportion of the debts or liabilities of the corporation; but the pledgor, or person or estate represented, is to be deemed the stockholder as respects such liability. In corporations having no capital stock, each member is individually and personally liable for his proportion of its debts and liabilities, and similar actions may be brought against him, either alone or jointly with other members, to enforce such liability, as by this section may be brought against one or more stockholders, and similar judgments may be rendered. The

liability of each stockholder of a corporation formed under the laws of any other State or Territory of the United States, or of any foreign country, and doing business within this State, shall be the same as the liability of a stockholder of a corporation created under the constitution and laws of this State."

The Corporation complied with the Laws of California by filing a certified copy of its charter in the office of the Clerk of the County in which the City of Pasadena is situated (page 30). It purchased land near the City of Pasadena and commenced the erection of a hotel thereon and continued to transact business within the State of California until July 12th, 1907, when it was adjudged insolvent (page 30).

As a defense the defendant urges that at the time of his subscription to the capital stock of the corporation and the receipt of the certificate of stock, he, the defendant, agreed with the corporation and the incorporators and stockholders thereof, that the capital stock so issued to him by the corporation should be forever non-assessable by the corporation and that he and his property should be exempt from all liability for its debts or obligations, and that the corporation should have no power to subject him or other stockholders to any personal liability for the corporation's debts (page 29).

This defense is based upon provisions contained in the certificate of incorporation, paragraph XII, said certificate reading as follows:

> "The private property of the stockholders of this corporation shall be and is hereby made forever exempt from all liability for its debts or obligations" (page 15).

He further claims by way of defense that on the days when the notes referred to in the amended complaint were made, he had no knowledge or notice of the provisions of the Constitution and Laws of the State of California which purport to impose personal liability upon stockholders of foreign corporations doing business in the State of California, but on the contrary was advised and believed that on subscribing to the stock he would assume no personal liability to any creditors of said corporation (page 30).

He also urges that at the times these notes were made, the banks which made the loans had notice of the certificate of incorporation, and that under the laws pursuant to which the corporation was incorporated, and by virtue of the agreement of the incorporators, the defendant could not be subjected to any personal liability for any debts or liabilities of the corporation to any creditor thereof (page 30).

The defendant also claims as a further defense that he was discharged from any liability on the notes involved in the present suit by the failure of plaintiff's assignors, the First National Bank of Pasadena and the Union Savings Bank of Pasadena, to apply on said notes and deposits of the Wentworth Hotel Company held by said Banks at and after the maturity of the notes (pages 32, 33). and also by plaintiff's waiver and abandonment of an action started by him against the Wentworth Hotel Company (pages 34, 35).

Exceptions and Assignments of Error.

The case was tried on an agreed statement of facts, and upon these facts the plaintiff asked the Court to award judgment in his favor for such proportion of the liability upon the notes as 1,000, the number of shares of the corporation owned by the defendant, bears to 3,500, the total number of shares issued and outstanding. The Court refused so to hold, and the plaintiff's counsel duly excepted (page 48). The Court thereupon rendered its decision dismissing the complaint upon the merits, to which ruling the plaintiff again excepted.

The assignments of error relied upon here are those involved in the decision of the Court giving judgment in favor of the defendant (page 49) and refusing to give judgment in favor of the plaintiff (page 50).

With respect to the contention of the defendant that, as a matter of fact, he intended his liabilities to be only those imposed by the laws of Arizona, the Court was asked to make the following declaration of law: (page 47)

> "No intent of the defendant, nor any understanding or agreement between him and the other stockholders of the Wentworth Hotel Company, can defeat or impair the obligation imposed upon him by the laws of California with respect to business transacted in that State."

The Court refused so to rule and counsel for plaintiff duly excepted. (page 48.)

This refusal is specifically assigned as error, (page 49), and is discussed in the Third Point, though it is but one phase of the broad question of which party is, upon all the facts, entitled to succeed.

POINT I.

This case is controlled by the decision in Pinney v. Nelson, 183 U. S., 144, unless a valid ground for distinction be furnished by one of the following facts: (1) That the freedom of the stockholders from individual liability was in this case, pursuant to the provision of the Arizona law, declared in the Articles of Incorporation, whereas in Pinney v. Nelson it was established by the general law of the State where the corporation was organized; (2) That defendant is not a resident of California; (3) That it was defendant's purpose and intent that his liability as a stockholder be controlled by the law of Arizona.

In *Pinney* v. *Nelson*, 183 U. S., 144 this Court had under consideration a state of facts strikingly similar to those in the present case, and the same provisions of the California constitution and statutes were involved.

In that case an action was commenced in California to enforce a personal liability of stockholders of a Colorado corporation. The charter of that corporation provided that the company was created for the purpose of carrying on part of its business outside of the State of Colorado, and that the principal place of business outside of Colorado should be in Los Angeles, and such other places in California as might be decided upon by the Board of Directors.

The defendant urged that he was not liable because there was no statute of Colorado which provided that stockholders of a corporation created by the laws of that State should be liable for any portion of the indebtedness of the corporation.

In deciding the case the Court, by Mr. Justice Brewer, said:

> "The plaintiffs-in-error rely upon the proposition that the liability of a stockholder is determined by the charter of the corporation and the laws of the State in which the incorporation is had. 'If the constitution to which a corporator has agreed does *not* provide for individual liability to creditors, he cannot be charged with individual liability anywhere (Morawetz on Corporations, 2nd ed., Sec. 874).' They invoke the *lex loci contractus*, and say that the stockholders' contract was made in Colorado, that being the State in which the Los Angeles Iron and Steel Company was incorporated; that by the laws of that State there is no personal liability of stockholders; that it is not within the power of California to change the terms of that contract, the Federal Constitution (Art. I, Sec. 10) forbidding a State to pass a law impairing the obligation of contracts; that while California, which prescribes an individual liability of stockholders, may if it sees fit exclude every corporation of another State whose stockholders do not assent to such liability, yet if it fails to do so, and such Colorado corporation actually comes into California to transact business, such coming into the State and the transaction of business therein do not change the terms of the stockholders' contracts, or impose a personal liability; and also that in such a case an attempt to enforce the statutory provisions of California so far as to change the personal liability of corporators in the foreign corporation, is in con-

flict with the due process and equal protection clauses of the first section of the Fourteenth Amendment. * * *

Passing to a consideration of the stockholders' contract in the light of the other contention, it may be said that ordinarily it is controlled by the law of the State in which the incorporation is had. That is the place of contract, and, generally, the law of the place where a contract is made governs its nature, interpretation and obligation. While this is so, it is also true that parties in making a contract may have in view some other law than that of the place, and when that is so that other law will control.

That the parties have some other law in view and contract with reference to it is shown by an express declaration to that effect. In the absence of such declaration it may be disclosed by the terms of the contract and the purpose with which it is entered into * * *

As then a corporation can have no legal existence outside of the State in which it is incorporated, the contract of the stockholders with one another, by which the corporation is created, is presumed to have been made with reference to the laws of that State, nothing being said in the charter to the contrary. But as comity permits a corporation to enter another State and do business therein, it is competent to contract with reference to the laws of a State in which they propose the corporation shall do business. And in this case the stockholders in their charter specified that the purpose of the incorporation was partly business beyond the limits of Colorado, and that the principal part of such outside business should be carried on in California. Not content to rely upon the general authority which by the rules of comity the Colorado corporation would have to enter California, and transact business therein, they in terms set forth that a part of the purpose of the incor-

poration was the transaction of business by the corporation in California. Now when they in terms specified that they were framing a corporation for the purpose of having that corporation do business in California, is it not clear that they were contracting with reference to the laws of that State? Contracting with reference to the laws of that State they must be assumed to know the provisions of those laws; that by them a personal liability was cast upon the stockholders in corporations formed under the laws of the State, and that that same liability was also imposed upon the stockholders of corporations formed under the laws of other States and doing business within California. How can it be said that those laws do not enter into the contract and control as to all business done in pursuance of that contract within the limits of California? Suppose these same stockholders in Colorado had formed a partnership with the expressed intent of carrying on business in California, would not that expressed intent be a clear reference to the laws of California and an incorporation of those laws into the liabilities created by the partnership business in California? And if this rule obtains as to contracts of partners between themselves, why not also as to contracts of stockholders between themselves in forming a corporation?

In this case it appears that the business transactions out of which these liabilities arose were carried on in California. They resulted from business done in California by virtue of an express contract made by the stockholers with reference to such business. It is unnecessary to express an opinion upon the question whether any personal liability would be assumed by the stockholders in reference to business transacted in Colorado. Parties may contract with special reference to carrying on business in separate States,

> and when they make an express contract therefor the business transacted in each of the States will be affected by the laws of those States, and may result in a difference of liability. Neither is it necessary to express any opinion upon the question whether the defendants could have been held liable under the California statutes, independently of the provisions of the Colorado charter. All that we here hold is that when a corporation is formed in one State, and by the express terms of its charter it is created for doing business in another State, and business is done in that State, it must be assumed that the charter contract was made with reference to its laws; and the liabilities which those laws impose will attend the transaction of such business."

The doctrine enunciated in *Pinney* v. *Nelson* has been accepted by the Courts of California as controlling, and it has been expressly approved by the highest court of at least one other State. Thus, in *State* v. *New Orleans Warehouse Company*, 109 La., 72, 33 So. Rep., 81, the court, by Breaux, J., said:

> "We agree with the view expressed in *Pinney* v. *Nelson* 183 U. S., 144, cited by plaintiff, *i. e.*, that when a corporation is formed in one State to carry on business in another, the charter contract must be assumed to have been made with reference to the latter."

By the decisions of the highest court of California, the liability under such circumstances of stockholders who are residents of that State is established beyond the possibility of dispute.

In *Peck* v. *Noee*, 154 Cal., 341, decided October 9th, 1908, the action was brought to enforce the

individual liability, provided by the California law, against stockholders (residents of California) of a corporation organized under the laws of the State of Nevada. In the articles of incorporation it was declared that the corporation was formed for the purpose of doing business in California. By the constitution of Nevada it is provided that "corporators of corporations formed under the laws of this State shall not be individually liable for the debts or liabilities of such corporations." The court held that the stockholders were individually liable, under the laws of California, for the debts of the corporation incurred in doing business in that State, saying:

> "Under these circumstances the case of *Pinney* v. *Nelson*, 183 U. S., 145, is controlling to the effect that the liability of stockholders, individually, to the creditors of the corporation, for debts incurred by the corporation in doing business in California is governed by the laws of California on this subject."

The case of *Thomas* v. *Wentworth Hotel Company*, 158 Cal., 275 (decided August 3, 1910) arose out of the identical facts here involved, except that the stockholders against whom recovery was had in that action were residents of California. The court, by Schloss, J., said:

> "The facts so set up and found do not constitute any defense to the action—a conclusion which requires no support further than that afforded by a citation of the cases of *Pinney* v. *Nelson*, 183 U. S., 144, and *Peck* v. *Noee*, 154 Cal., 351. In the first of these cases it was held that stockholders of a Colorado corporation, whose articles of incorporation declared its purpose of doing part of its busi-

ness in the State of California, were liable according to the provisions of Section 322 of the Civil Code for liabilities incurred by the corporation in the latter State, notwithstanding the fact that under the laws of Colorado a stockholder is not liable for any portion of the corporate debt. In *Peck* v. *Noee*, the rule was applied to the case of a corporation organized under the laws of Nevada, whose constitution provided that 'corporators of corporations formed under the laws of this State shall not be individually liable for the debts or liabilities of such corporations.' The appellant has not succeeded in distinguishing the case at bar from those cited. It is true, as contended, that the liability of stockholders rests upon contract and that the terms of the contract between the incorporators are ordinarily to be ascertained from the articles of incorporation, read in the light of the statute which authorizes the creation of the corporate body. But, as is pointed out by the Supreme Court of the United States in *Pinney* v. *Nelson*, *supra*, when a contract is made with reference to the laws of a jurisdiction other than that of the place of contracting, the parties will be deemed to have incorporated into their agreement the law of the jurisdiction with reference to which they were contracting. Accordingly, says the court, 'when a corporation is formed in one State, and by the express terms of its charter it is created for doing business in another State, and business is done in that State, it must be assumed that the charter contract was made with reference to its laws; and the liabilities which those laws impose will attend the transaction of such business.' It can make no difference that in *Pinney* v. *Nelson* and *Peck* v. *Noee*, the freedom from individual liability was declared by statute or constitution, whereas here it was, under the authority of the statute, declared in the articles. The provision

of the articles can have no greater force than is to be attributed to the express law of the State creating the corporation. Such law is, for most purposes, imported into the contract of association and forms a part of it, whether stated in the charter or not. But, in so far as the charter or articles declare an intent to do business in another State, the law of that State becomes, so far as concerns business there done, a part of the contract. The articles, like the law itself, are not to be read as providing for exemption from stockholders' liability for debts to be incurred in a State which permits foreign corporations to come in only upon condition that the stockholders shall be liable for the corporate debts. And here is the answer to the suggestion that the filing, in this State, of certified copies of the articles conveyed to creditors constructive notice of the fact that the contract of the corporators exempted them from liability and estopped the creditors from claiming such liability. The contract, properly construed, does not purport to apply such exemption to business done in California, and there is no ground, therefore, for the operation of an estoppel.

The appellant argues, in his brief, that in both of the cases relied on by the plaintiff the articles showed an intent to do the entire corporate business in California, whereas here the articles indicate an intent to do a part of the business of the corporation in other places. The supposed distinction does not really exist. The articles of incorporation in the Pinney cases declared, merely, a purpose of carrying on *part* of the business beyond the limits of Colorado, the State of incorporation, and provided for an office and place of business in Colorado. In this respect the articles are very similar to those of the corporation here involved. But, if the fact were as suggested, it would present no valid ground of

discrimination. The fact that a corporation is formed in one State with the declared purpose of doing business in another justifies, as we have seen, the assumption that, with regard to the business to be done in such other State, the corporators agree to be bound by its laws. It can make no difference whether they intend to do all or only a part of their business in such State. Their relations to the State into which they come, with regard to business there done, cannot be affected by the circumstance that they also intend to, or do, transact some business elsewhere.

There is no injustice or hardship in this result. The law of this State declares in express terms that 'the liability of each stockholder of a corporation formed under the laws of any other State or Territory of the United States, or of any foreign country, and doing business within this State, is the same as the liability of a stockholder of a corporation created under the constitution and laws of this State' (Civ. Code, Sec. 322). This statute carries out the constitutional mandate that foreign corporations shall not be 'allowed to transact business within this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State' (Const. Cal., Art. XII, Sec. 15). These provisions existed when this corporation was formed for the express purpose of doing business in California. The stockholders, seeking to avail themselves of the permission granted by this State to foreign corporations to do business here, knew or should have known, the terms upon which this privilege was tendered. They should not be allowed to take advantage of the benefits afforded by our law, at the same time repudiating the accompanying burdens."

It will be observed that in the foregoing opinion the Court has squarely met every point that

could be used to distinguish the present case from *Pinney* v. *Nelson* (183 U. S., 144) except (1) the fact that the defendant herein is not a resident of California; and (2) the fact that in the finding of facts in this case there is a statement that "it was the purpose and intent of such subscribers that their obligations as such and as stockholders in said company should be controlled and determined by the articles of incorporation of said company and by the laws of Arizona."

Therefore, unless one or the other of these supplies a sound reason for varying the rule, there can be no doubt that the defendant is liable under the law of California.

POINT II.

The fact that the Articles of Incorporation in this case contain a declaration, as authorized by the Arizona law, that the stockholders shall not be personally liable for the debts of the corporation, does not distinguish this case from Pinney v. Nelson.

By the statute law of Arizona, in which State the Wentworth Hotel Company was incorporated, a corporation there organized is authorized to exempt its stockholders from personal liability by a statement to that effect in the articles of incorporation. Such a declaration was inserted in the articles of the Wentworth Hotel Company.

In *Pinney* v. *Nelson*, however, the articles of the Colorado Company there involved did not contain a declaration to that effect, but there was in Colorado no statute or constitutional provision imposing a personal liability and that being the case, none existed in that State. 26 Am. & Eng. Enc. of Law (20 ed.), 1017.

In *Terry* v. *Little*, 101 U. S., 216, Mr. Chief Justice Waite said: "The individual liability of stockholders is always a creature of statute. It does not exist at comon law."

This exact question was considered in *Thomas* v. *Wentworth Hotel Co.*, 158 Cal., 275, and there the Court said:

> "It can make no difference that in *Pinney* v. *Nelson* and *Peck* v. *Noee* [154 Cal., 351] the freedom from individual liability was declared by statute or constitution, whereas, here it was, under the authority of the statute, declared in the articles. The provision of the articles can have no greater force than is to be attributed to the express law of the State creating the corporation. Such law is, for most purposes, imported into the contract of association and forms a part of it, whether stated in the charter or not."

That the charter contract impliedly includes the general law of the State, so far as applicable, appears to be well settled.

Thus in *Citizens Savings Bank* v. *Owensboro*, 173 U. S., 636, 644, it was held that a general statute reserving the power to repeal, alter or amend corporate charters must be read into a subsequently granted charter.

In *Knights of Phythias* v. *Weller*, 93 Va., 605, 613, the Court said:

> "It is not necessary that the general law should be copied in the charter. It forms an essential part of it and all parties are bound by its terms, whether copied in the charter or found only in the statute book."

In *Danville* v. *Danville Water Company*, 178 Ill., 299, 306, the Court said:

> "The charter of a corporation formed under the general incorporation act does not consist of its articles of association alone, but of such articles taken in connection with the law under which the organization takes place. The provisions of the law enter into and form a part of the charter."

Incidentally it may be remarked that the ruling in *Pinney* v. *Nelson* appears to have been based not at all on the absence of a declaration of freedom from personal liability, but altogether on the presence of an express declaration that the corporation was to transact business in California.

In that case the truthfulness of the following averment in the answer was admitted by stipulation:

> "Defendants allege that there is no statute of the State of Colorado providing that stockholders shall be liable for any portion of the indebtedness of a corporation, and allege that under the laws of the State of Colorado a stockholder is not liable for any portion of the indebtedness of said corporation."

POINT III.

The fact that in this case there is a finding that it was the purpose and intent of the stockholders that their obligations should be controlled by the Articles of Incorporation and by the laws of Arizona, does not distinguish this case from Pinney v. Nelson.

In the stipulation of facts in this case (fol. 115) is the following sentence:

> "That at the time the defendant subscribed for said stock it was the purpose and intent of himself and of the other subscribers for stock in said Wentworth Hotel Company that said Company would have the power, among others, to erect a hotel and engage in the hotel business near the city of Pasadena, in the State of California, and that it would probably erect such a hotel and engage in such business, but it was the purpose and intent of such subscribers that their obligations as such and as stockholders in said company should be controlled and determined by the articles of incorporation of said company and by the laws of Arizona."

It has been contended by defendant's counsel that this stipulation puts the present case outside the principle of *Pinney* v. *Nelson* because that decision was grounded on the presumption *that the stockholders intended to assume the liabilities imposed by the laws of California.*

The intent to engage in business in California, and the intent to avoid personal liability are ex-

pressed as clearly as possible in the charter of the corporation. The stipulation adds nothing to the force of the charter provisions.

But a careful reading of the opinion in *Pinney* v. *Nelson* fails to disclose that the decision rests on any such basis. The only *intent* on the part of the stockholders required by the rule there announced is the expressed intent that the corporation shall transact business in a designated foreign State. This intent having been expressed by the stockholders, *the law* reads into their contract an agreement to assume such personal liability as is imposed by the law of the named State so far as relates to business transacted therein by the corporation. The concluding paragraph of the opinion in *Pinney* v. *Nelson* reads thus:

> "All that we here hold is that where a corporation is formed in one State and by the express terms of its charter, it is created for doing business in another State, and business is done in that State, it must be assumed that the charter contract was made with reference to its laws; and the liabilities which those laws impose will attend the transaction of such business."

Nowhere in the opinion does the Court rely upon an *intent* of the stockholders to be governed by the California law. The language used is that, under the given circumstances, the contract was made "with a view to" or "with referene to" that law—a vastly different thing from contracting with an intent to be bound by it. Doubtless the stockholders held liable in the *Pinney* case could have truly sworn that they never intended to assume the liability which was there fastened upon them.

It is altogether likely that the organizers of the Wentworth Hotel Company acted "with a view to" the law of California. Indeed it is not wholly improbable that their "purpose and intent" in incorporating in Arizona was to *evade* the law of California, if possible. But there can be no question that the Stockholders did intend that the corporation should transact business in California, and under the ruling in *Pinney* v. *Nelson* that was enough to fix upon them, so far as concerned business transacted there, the liabilities imposed by the law of that State, regardless of whether they intended to assume such liabilities or not. For several years before the stockholders entered into their contracts *Pinney* v. *Nelson* had stood as the law of the land and they were chargeable with notice of it.

Apparently the decision of the Circuit Court of Appeals was influenced by the English case of *Risdon Iron & Locomotive Works* v. *Furness,* L. R. (1906) 1 K. B., 49, which was an action against a stockholder of an English corporation to recover his proportion of debts contracted by the corporation in California. But in that case there was lacking the principal factor on which the decision in Pinney *v.* Nelson was based—there was no declaration in the charter of a purpose to do business in California—and Collins, M. R., expressly stated that the holding was not in conflict with Pinney *v.* Nelson. Alluding to that decision, he said (p. 58):

> "By the constitution of the company in that case there were provisions out of which the Court inferred that there was an express agreement, to which all the shareholders must be taken to be parties, that the business of

> the company should be conducted in a named and foreign state. The inference of fact was that every person who could be said to be a party to the initiation and incorporation of that company must be taken to have authorized the company to trade in California, that being the special object with which the company was incorporated. That was the inference of fact that was drawn. It is not for us to canvass whether it was rightly drawn or not in that case. In the case before us there is a complete absence of the materials on which the inference was drawn in that case."

The fallacy in the reasoning of the Circuit Court of Appeals is to be found in the last sentence of the opinion:

> "But we do not think the latter [Pinney *v.* Nelson] requires us to assume an intention upon the part of the stockholders which contradicts the express provisions of their charter."

The confusion of thought here arises from the failure of the court to recognize the distinction between a contract implied in fact and a contract implied in law, or *quasi*-contract. The latter, says Judge Keener,

> "is a term used to cover a class of obligations where the law, though the defendant did not intend to assume an obligation, imposes an obligation upon him, notwithstanding the absence of intention on his part, and in many cases in spite of his actual dissent."
>
> *Keener on Quasi-Contracts*, p. 5.

The statutory liability of stockholders, while commonly spoken of as contractual in its nature, is in fact *quasi*-contractual; it attaches without

regard to the stockholders' intent. To illustrate, suppose that a person buys the stock of a national bank in ignorance of the personal liability affixed thereto by law, would it be any defense to him to say that he did not intend to assume such a liability? And to come nearer to the present case, suppose that a corporation organized under the laws of California, were to include in its articles of incorporation a declaration that the stockholders should not be personally liable for the debts of the corporation, would this be sufficient to defeat the statutory liability?

The expressed purposes of the incorporators, to do business in California, and also to be free from personal liability, should and can be reconciled. Within the State of Arizona and wherever the law permitted it, they were to be exempt, but where, pursuant to the other provisions of the charter the corporation entered a State whose laws did not suffer a stockholder to be exempt, the intent to be free from liability became subordinate to the desire there to do business. Such an interpretation is fair and reasonable. Whenever they could lawfully escape liability, they were to be exempt; whenever, however, such exemption should be unlawful and, nevertheless, they wished to act and should act, there the intent to escape liability became immaterial. Such is the effect of the reasoning of the Supreme Court of California in *Thomas* v. *Wentworth Hotel Company* (*supra*). As the court said:

> "The provision of the articles can have no greater force than is to be attributed to the express law of the State creating the corporation. Such law is, for most purposes, imported into the contract of association and forms a part of it, whether stated in the char-

ter or not. But, insofar as the charter or articles declare an intent to do business in another State, the law of that State becomes, so far as concerns business there done, a part of the contract. The articles, like the law itself, are not to be read as providing for exemption from stockholders' liability for debts to be incurred in a State which permits foreign corporations to come in only upon condition that the stockholders shall be liable for the corporate debts."

The organizers of the Wentworth Hotel Company proceeded "with reference to" the law of California, and possibly "with a view to" evading it. Can the law be evaded by such an "intent?" If so, the statute of any State may be nullified at the pleasure of those who while enjoying the State's benefits are unwilling to accept the attendant burdens.

So, then, if our contentions be correct, neither the stipulation as to the intent of the stockholders, nor the fact of defendant's residence in New York, nor yet the fact that freedom from liability is declared in the articles of incorporation, furnishes any legal ground for distinguishing the present case from *Pinney* v. *Nelson*.

POINT IV.

The fact that defendant is not a resident of California does not distinguish this case from Pinney v. Nelson.

(a) *The question is: Did defendant contract to assume the liabilities imposed by the Carifornia law for debts incurred by the corporation in that State? If so, the place of his residence is not material.*

It has been argued in behalf of defendant that, as the stockholders whose liability was passed upon in *Pinney* v. *Nelson* were residents of California, that decision is mere dictum so far as concerns a stockholder residing in New York.

But, we submit that, no distinction having been made in that case between stockholders residing in California and those residing in other States, it is not to be regarded as dictum so far as relates to the latter class, unless some valid ground of distinction between the two classes of stockholders be pointed out. If in fact the California stockholders and the New York stockholders are, so far as concerns the liability here sought to be enforced, on an equality—if they are all equally liable or equally non-liable—then the ruling in *Pinney* v. *Nelson* constitutes "an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties" (*Carroll* v. *Lessees of Carroll*, 16 How. (U. S.), 275, 287).

We contend that the place of residence of the individual stockholders is entirely immaterial

and foreign to the principal point to be decided. The question is whether the individuals who formed a corporation in Arizona to do business in California thereby agreed to submit themselves to the California law in regard to debts contracted by the corporation while doing business in the latter State. *Either all of them made this alleged contract or else none of them did.* If the statement in the articles of incorporation that stockholders were not to be personally liable for the corporate debts exempted a *New York* stockholder so also did it exempt a *California* stockholder. And yet, as we have already seen, the citizens of California who were stockholders of this same corporation have been held liable in the courts of their own State (*Thomas* v. *Wentworth Hotel Company*, quoted at length in Point I). If the defendant could have been served with process in California, would his status as a citizen of New York have availed him there?

But, says the defendant, while the citizens of California were chargeable with notice of the law of California, he, being a citizen of New York, was not. To this we reply that it is of no moment whether this or that stockholder did or did not know the California law. The question here is whether the expressed intention in the charter contract that the corporation was to transact business in California embraced by implication of law an agreement by the stockholders to assume the liabilities imposed by the California law, so far as relates to the business transacted in that State, and if they did in fact so agree, it makes no difference whether or not they were ignorant of the California law. Supposing they had *expressly* incorporated such an agreement into the

articles of incorporation, would any of them have been permitted to escape on the ground that they did not know what the liabilities were which they had agreed to assume?

So also the same reasoning furnishes a reply to the defendant's point that by the filing of the articles of incorporation in California all persons doing business therein with the corporation were put on notice of the terms of such articles. As to residents of California this point is squarely met in *Thomas* v. *Wentworth Hotel Company*, 158 Cal., 275, where the Court says:

> "The articles, like the law itself, are not to be read as providing for exemption from stockholders' liability for debts to be incurred in a State which permits foreign corporations to come in only upon condition that the stockholders shall be liable for the corporate debts. And here is the answer to the suggestion that the filing in this State of certified copies of the articles conveyed to creditors constructive notice of the fact that the contract of the corporators exempted them from liability and estopped the creditors from claiming such liability. The contract properly construed does not purport to apply such exemption to business done in California and there is no ground therefore, for the operation of an estoppel."

A citizen of California, knowing that, under its constitution and laws as construed by its highest Court, the stockholders of a foreign corporation organized to transact business there are personally liable for the debts of the corporation, has a right in extending credit to such corporation, to rely upon his power to enforce that liability against its stockholders, a right which it would be an injustice to make contingent upon his ability to serve them with process within that State.

The Courts of the United States are adequate in their procedure and in their jurisdiction to enforce a common law remedy anywhere within the United States, and where the right to that remedy rests upon a simple contract, a refusal to give it effect merely because the boundary of a State happens to intervene between the place where the liability was contracted and the place where the process can be served, would tend rather to the subversion than to the establishment of justice.

(b) *The stockholders' liability imposed by the law of California is contractural in nature.*

This proposition is not disputed by the defendant and is clearly established by the decisions.

Kennedy v. *California Savings Bank*, 97 Cal., 93;
Flash v. *Conn*, 109 U. S., 371;
Whitman v. *Oxford Nat. Bank*, 176 U. S., 559;
26 Am. & Eng. Enc. of Law (2nd ed.), 1020.

(c) *Plaintiff pursued the proper remedy in a Court of adequate jurisdiction.*

No objection having been raised below to the jurisdiction of the Court or the form of the proceeding it is unnecessary to discuss those questions at length.

That the United States Courts have jurisdiction to enforce such a liability outside of the State where it was created seems to be well settled.

Bernheimer v. *Converse*, 206 U. S., 516, 529;

Whitman v. *Oxford National Bank*, 176 U. S., 558, 563;
Flash v. *Conn*, 109 U. S., 371;
Cook on Corporations, Section 223, note 2.

As was said in *Ferguson* v. *Sherman*, 116 Cal., 169, 173, "Where, in short, the statutory liability is a simple personal liability growing out of the contract of the shareholder, that liability may be enforced wherever jurisdiction over the particular shareholder may be obtained."

The California statute provides no peculiar remedy and therefore the general liability created thereby may be enforced by a common law action at law in the Federl Court.

Mills v. *Scott*, 99 U. S., 25;
National Park Bank v. *Peary*, 64 Fed., 912.

Thus, it has been held that the statutory liability of stockholders in a California corporation may be enforced by an action at law in Oregon, although the liability of stockholders in an Oregon corporation may be enforced only by a suit in equity.

Aldrich v. *Anchor Coal, etc., Co.*, 24 Oreg., 32.

POINT V.

The liability of a stockholder under the California law is not that of a surety but is primary, absolute, unconditional, and in no wise contingent, and it is distinct from that of the corporation. A suspension or bar of the remedy against the corporation does not suspend or bar it against the stockholder. It is not affected by any security given to or held by the creditor or by any lien acquired by him through judgment, attachment or otherwise. It is not released or diminished by any extension of time given to the corporation, and if the stockholder discharges his liability to a creditor he can recover no portion of the same back, either by subrogation or otherwise.

In his supplemental answer defendant sets up that, even though he should be held to have assumed a personal liability under the California law, yet such liability is only that of a surety, and consequently he was discharged by the failure of plaintiff and his assignors to exhaust their remedies against the corporation.

But this contention is wholly unsupported by the authorities, for by a long and unbroken line of decisions the California Supreme Court has estab-

lished beyond dispute that the liability is primary and not that of a surety.

Mokelumne Hill, etc., Co. v. *Woodburn,* 14 Cal., 265;
Davidson v. *Rankin,* 34 Cal., 503;
Young v. *Rosenbaum,* 39 Cal., 646;
Sonoma Valley Bank v. *Hill,* 59 Cal., 107;
Faymonville v. *McCullough,* 59 Cal., 285;
Mitchell v. *Beckman,* 64 Cal., 383;
In re California Mut. Life Ins. Co., 81 *Cal.,* 364;
Hyman v. *Coleman,* 82 *Cal.,* 650;
Knowles v. *Sandercock,* 107 Cal., 629;
Herman v. *Hecht,* 116 Cal., 553;
Sacramento Bank v. *Pacific Bank,* 124 Cal., 147.

In the Court below defendant's counsel cited *In re California Mut. Life Ins. Co.,* 81 Cal., 364, as supporting his contention that the liability was merely that of a surety, but he clearly misread the opinion, for the holding is exactly to the contrary. There certain stockholders who had discharged their *pro rata* share of the corporate debts sought reimbursement out of the guaranty fund of the Company. This, the Court held, they were not entitled to, saying (p. 369):

> "The guaranty fund provided for by the statute is an *additional* security to parties over and above the liability of the Company and its stockholders, and as between the makers of these notes and the Company and its stockholders, the money paid by the stockholders cannot be made a charge upon such guarantors."

Morrow v. *Superior Court of the City and County of San Francisco,* 64 Cal., 383, was a petition for a writ of *certiorari* to review an action in the Superior Court of the City and County of San Francisco. The action was against a stockholder to enforce his personal liability. The Court said:

> "It is expressly provided that each stockholder shall be individually and personally liable for a proportion of all the debts and he is necessarily liable for the same proportion of each debt. All the debts mean every debt of the Company, and it does seem to us that any creditor is entitled to sue any stockholder for such proportion of the indebtedness of the Company to such creditor as the stock of such stockholder bears to the whole capital stock of said Company. The stockholder is made individually, not jointly, liable, and if it should be the misfortune of any stockholder to be sued by each creditor of the Company, the aggregating of their several recoveries could not exceed the sum which all might recover in a joint action. As to the primary liability of the stockholders of the Company for its debts, we entertain no doubt."

In *Hyman* v. *Coleman,* 82 Cal., 650, the Court said:

> "It is settled law in this State that under our constitution and statutes each stockholder of a corporation is liable for his proportion of the corporate debts contracted while he was a stockholder, as a principal debtor and not as a surety."

Citing

Mokelumne Hill Canal Co. v. *Woodbury,* 14 Cal., 265;
Neilson v. *Crawford,* 52 Cal., 248;
Sonoma Valley Bank v. *Hill,* 59 Cal., 107;
Morrow v. *Sup. Ct.,* 64 Cal., 383.

POINT VI.

Even though the personal liability of a stockholder under the California law were merely that of a surety the facts alleged in the supplemental answer would not constitute a defense.

(a) *A bank, the payee or holder of a note, does not discharge a surety by failing to apply money of the maker which happens to be on deposit at or after the time the note matures.*

From the 14th and 15th findings (pages 32, 33) it appears that, at and after the maturity of the notes on which this action is based, plaintiff's assignors, the First National Bank of Pasadena, and the Union Savings Bank of Pasadena, held deposits of the Wentworth Hotel Company which were not applied on said notes. This, defendant claims in his supplemental answer, discharged him from liability, he being a surety.

The principle sometimes upheld that if a creditor without the consent of the surety parts with or renders unavailable any security or funds which he has a right to apply in satisfaction of the debt, the surety is exonerated or discharged to the extent of the value of such security, or to the extent of the impairment of its value, does not apply to a bank which permits a depositor to withdraw funds on deposit although indebted to the bank.

Strong v. *Foster*, 17 C. B., 217.
Citizens Bank v. *Elliott*, 9 Kansas App. 797.

Martin v. *Mechanics Bank,* 6 Mar. & J. (Md.), 235.
McShane v. *Howard Bank,* 73 Md., 135.
Citizens Bank v. *Booze,* 75 Mo. App., 189.
Houston v. *Braden,* 37 S. W. Rep., 467.
Bank of British Columbia v. *Jeffs,* 15 Wash., 230.
National Bank v. *Peck,* 127 Mass., 301.
Voss v. *German American Bank,* 83 Ill., 599.
National Bank v. *Smith,* 66 N. Y., 271.
Glazier v. *Douglass,* 32 Conn., 383.

In the case of *National Bank* v. *Peck,* 127 Mass., 298, the Supreme Court of Massachusetts, speaking by Chief Justice Gray, said, at p. 300:

> "Money deposited in a bank does not remain the property of the depositor, upon which the bank has a lien only; but it becomes the absolute property of the bank, and the bank is merely a debtor to the depositor in an equal amount. Foley *v.* Hill, 1 Phillips, 399, and 2 H. L. Cas., 29; Bank of Republic *v.* Millard, 10 Wall., 152; Carr *v.* National Security Bank, 107 Mass., 45. So long as the balance of account to the credit of the depositor exceeds the amount of any debts due and payable by him to the bank, the bank is bound to honor his checks, and liable to an action by him if it does not. When he owes to the bank independent debts, already due and payable, the bank has the right to apply the balance of his general account to the satisfaction of any such debts of his. But if the bank, instead of so applying the balance, sees fit to allow him to draw it out, neither the depositor nor any other person can afterwards insist that it should have been so applied. The bank, being the absolute owner of

the money deposited, and being a mere debtor to the depositor for his balance of account, holds no property in which the depositor has had any title or right of which a surety on an independent debt from him to the bank can avail himself by way of subrogation, as in Baker *v.* Briggs, 8 Pick., 122, and American Bank *v.* Baker, 4 Met., 164, cited for the defendant. The right of the bank to apply the balance of account to the satisfaction of such a debt is rather in the nature of a set-off or of an application of payments, neither of which, in the absence of express agreement or appropriation, will be required by the law to be so made as to benefit the surety. Glazier *v.* Douglass, 32 Conn., 393; Field *v.* Holland, 6 Cranch, 8, 28; Brewer *v.* Knapp, 1 Pick., 332; Upham *v.* Lefavour, 11 Met., 174; Bank of Bengal *v.* Radakissen Mitter, 4 Moore P. C., 140, 1'2."

(*b*) *Plaintiff's failure to prosecute diligently his action against the corporation did not release defendant, even though his liability was merely that of a surety.*

It appears from the 16th and 17th findings (page 34) that the plaintiff commenced an action against the Wentworth Hotel Company, that at that time the property of the Wentworh Hotel Company was worth in excess of $450,000, and that the aggregate of the debts of the company, which were secured by the property or upon which suit had already been commenced, did not exceed the sum of $275,000, though at that time there was in addition a mortgage upon the property to secure an issue of bonds to the amount of $275,000, which bonds were, in fact, invalid, although that fact was not known to the plaintiff or his assignor

until after the commencement of this action, and that during the pendency of the action the plaintiff proved and filed his claim against the Receiver in insolvency of the Hotel Company.

These facts do not show any lack of diligence to pursue the remedy against the corporation, and even if they did, they would constitute no defense, for it is fundamental in the law of suretyship that the creditor owes to the surety no duty of active diligence. It is universally true that a mere nonfeasance on the part of the creditor will not discharge the surety. Mere inaction, indulgence, delay or forbearance on the part of the creditor to bring suit against the principal debtor, or his failure promptly to subject securities or to apply funds available for the satisfaction of the debt, furnish no defense to the surety.

Lowman v. *Yates*, 37 N. Y., 601;
Douglass v. *Ferris*, 138 N. Y., 192;
McKin v. *Williams*, 134 Mass., 13;
Greenway v. *Orthwein Grain Co.*, 85 Fed. Rep., 536;
Hunt v. *Purdy*, 82 N. Y., 486;
Jones v. *Allen*, 85 Fed. Rep., 523;
Biggins v. *Raisch*, 107 Cal., 210;
Monroe County v. *Otis*, 62 N. Y., 88;
Clark v. *Sickler*, 64 N. Y., 231.

POINT VII.

The judgment should be reversed, and, as all the material facts have been stipulated and the damages recoverable are a liquidated sum, no new trial should be awarded and the Court below should be directed to render the proper judgment against defendant.

Rathbone v. *Board of Commissioners* (C. C. A., 8th Circ.), 83 Fed. Rep., 125, and cases cited;
Irvine v. *Angus,* (C. C. A., 9th Circ.), 93 Fed. Rep., 629;
Churchill v. *Buck,* (C. C. A., 8th Circ.), 102 Fed. Rep., 38;
Ft. Scott v. *Hickman,* 112 U. S., 150;
Allen v. *St. Louis Nat. Bank,* 120 U. S., 20;
Saltonstall v. *Russell,* 152 U. S., 628.

The suit is upon two notes: One for $22,500 with interest at six per cent. and a "reasonable attorney's fee to be fixed by the Court if suit be instituted." No part of the principal has been paid and no interest has been paid since the 4th of February, 1907. It is alleged in the complaint that a reasonable fee within the meaning of the language of the note is $1,125, and a new trial is not necessary to enable the Court to fix a reasonable fee. At the time this note was given, Mr. Matthiessen owned 1,000 shares of the Wentworth Hotel Company out of a total issue of 3,500 shares or two-sevenths of the entire capital. The

plaintiff is, therefore, entitled to judgment on this note for $6,750 with interest from February 4, 1907.

The other note was for $25,000 with interest at six per cent. to be compounded quarterly together with an attorney's fee of ten per cent. No part of the principal of the note has been paid and no interest has been paid since February 16, 1907. Mr. Matthiessen is also responsible for two-sevenths of the amount due on this note, which is $7,857.14, with interest since February 16, 1907, at six per cent. compounded quarterly.

Under the California law the stockholder is liable for his *pro rata* share of interest as well as principal.

Wells, Fargo & Co. v. *Enright*, 127 Cal., 669.

The judgment should, therefore, be reversed and the case remanded with directions to the Court below to enter judgment for the plaintiff in accordance with the facts found.

Dated, New York, November 18, 1913.

Respectfully submitted,

ALFRED ADAMS WHEAT,
PHILIP ASHTON ROLLINS,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1913.

No. 171

FRANK N. THOMAS,

Petitioner,

vs.

CONRAD H. MATTHIESSEN,

(Defendant Below.)

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR CONRAD H. MATTHIESSEN, DEFENDANT BELOW.

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Authorities Cited.

Supreme Court of the United States.

FRANK N. THOMAS,
Petitioner,
(Plaintiff Below),

against

CONRAD H. MATTHIESSEN,
(Defendant Below).

BRIEF FOR CONRAD H. MATTHIESSEN, DEFENDANT BELOW.

Statement.

Writ of certiorari to the Circuit Court of Appeals for the Second Circuit, to review a judgment affirming a judgment of the Circuit Court of the United States for the Southern District of New York, dismissing the complaint upon the merits after a trial by the Court upon an agreed statement of facts.

The action was brought by a California creditor of an Arizona corporation, the Wentworth Hotel Company, which had done business in California, to enforce against the defendant, a citizen and resident of New York, an alleged individual liability as a stockholder in the Company

claimed to have been imposed upon him by the Constitution and Statutes of California.

Facts.

A jury having been waived, the facts were stipulated and found by the Trial Court.

The defendant at the time of the transactions with which we are concerned was and still is a citizen and resident of the State of New York (Record, p. 28).

The Wentworth Hotel Company is a corporation organized April 12th, 1906, under the Laws of the Territory (now State) of Arizona. A true copy of its certificate of incorporation is annexed to the answer and marked Exhibit A (Record, pp. 28, 12-15). These articles of incorporation contained the following provisions:

> "KNOW ALL MEN BY THESE PRESENTS:
> That we whose names are hereunto affixed do hereby associate ourselves together *for the purpose of forming a corporation under the Laws of the Territory of Arizona*, and to that end adopt the following Articles of Incorporation:
>
> I: The names of the incorporators are M. C. Wentworth, E. L. Bean, W. R. Staats, F. A. Warner and D. P. Hatch; and the name of the corporation shall be the Wentworth Hotel Company. The principal place in which the business of said corporation within the Territory of Arizona is to be transacted is Tucson, Pima County, Territory of Arizona, and the principal place of said corporation outside of the Territory of Arizona shall be in the City of Los Angeles, in the State of California, with the power in the Board of Directors to change the principal

place of business of said corporation, outside of the Territory of Arizona, from the City of Los Angeles to the City of Pasadena, if in their judgment they should so elect, at which place, when so elected, meetings of stockholders and of the Board of Directors may be held, and the corporation may have such branch offices, either within or without the Territory of Arizona as may be established by its Board of Directors.

II. The general nature of the business to be transacted by this corporation is as follows:

(*a*) To buy, own, lease, sell and otherwise acquire real property *anywhere* that its *Board of Directors may elect;* to build, maintain, operate and carry on in all its branches the business of hotel keeping. * * *

(*b*) To build, repair, maintain, acquire by purchase or otherwise and to operate gas or electric works of all kinds and descriptions in the Territory of Arizona or in the State of California *or elsewhere* that may be determined by its Board of Directors. * * *

(*c*) To hold, purchase or otherwise acquire, and to sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock, bonds or other evidences of indebtedness created by any other corporation or corporations. * * *

(*d*) To build, repair, maintain, acquire by purchase or otherwise, and to operate all water-works, mains, pipes, dams, reservoirs, streams and to take up and appropriate the same under the laws of the Territory of Arizona *or of any state, territory or colony of the United States and in all foreign countries and places.*

(*e*) To purchase, lease, exchange, hire or otherwise acquire any and all rights, privileges, pursuits or franchises suitable or con-

venient for any of the purposes hereinbefore or hereinafter mentioned or specified.

(*f*) To locate townsites and to buy, sell or in anywise hypothecate townsites and town lots and to lay out townsites and to develop streets, parks and alleys of the same, and to buy, sell and locate water rights, flumes, pipes lines and all other conveniences for conducting water, irrigating canals, rights of way and easements for the same and to buy and sell water for power and domestic use or any other purpose whatsoever.

(*g*) To borrow money and to encumber the corporate property as security for the payment thereof and to execute all bonds, debentures, bills, promissory notes and mortgages for the purpose of borrowing money to carry out the objects and purposes for which this corporation is formed.

III.—The amount of capital stock of this corporation shall be Three hundred and fifty thousand Dollars ($350,000), divided into thirty-five hundred shares (3500) of One hundred Dollars ($100) each. At such time as the Board of Directors may by resolution direct, said capital stock shall be paid into this corporation, either in cash or by the sale and transfer to it of real or personal property, or stock of other corporations, for the uses and purposes of said corporation, in payment for which shares of the capital stock of said corporation may be issued, *and the capital stock so issued shall thereupon and thereby become and be fully paid up and non-assessable,* and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property, stock or thing purchased shall be conclusive.

* * * * *

VIII.—As soon as practicable after the filing of these articles of incorporation in the

office of the County Recorder of Pima County, Territory of Arizona, the persons hereinbefore named as directors shall meet and adopt by-laws, that at regularly appointed meetings of the Board of Directors they may make such rules and regulations as they may deem necessary for the management of this corporation and its affairs, *consistent with these articles of incorporation and in accordance with the Laws of the United States and the Laws of the Territory of Arizona.*

* * * * *

XI.—*The capital stock of this corporation shall be and is hereby made forever non-assessable by this corporation for any purpose.*

XII.—*The private property of the stockholders of this corporation shall be and is hereby made forever exempt from all liability for its debts or obligations".*

(Record, pp. 12-15; Italics ours.)

Before the Wentworth Hotel Company was incorporated a paper was signed by the defendant and others outlining a proposition for incorporation under the laws of Arizona and for the erection of a hotel on a portion of Oak Knoll (property at Pasadena, California) and stating that the company was to be organized with a capital stock of $350,000 *"fully paid and non assessable"* (Finding III. Record pp. 28-29). After the incorporation. of the Wentworth Hotel Company the defendant subscribed for 1000 shares of its stock and in good faith paid the Company the full par value thereof, $100,000, in cash. (Finding IV, Record, p. 29).

In accordance with the stipulation of the parties the Trial Court below found as follows:

> "That at the time the defendant subscribed for said stock it was the purpose and intent of himself and of the other subscribers for stock in said Wentworth Hotel Company that said Company should have the power, among others, to erect a hotel and engage in the hotel business near the City of Pasadena in the State of California, and that it would probably erect such a hotel and engage in such business, *but it was the purpose and intent of such subscribers that their obligations as such and as stockholders in said company should be controlled and determined by the Articles of Incorporation of said Company and by the laws of Arizona.*
>
> V.—That at the time of the defendant's subscription to the capital stock of said Wentworth Hotel Company and of his payment of the amount thereof and receipt of the certificate of stock above mentioned, the defendant agreed with the said Wentworth Hotel Company and the incorporators and stockholders thereof, that the capital stock so issued to defendant by said company should be forever non-assessable by said corporation for any purpose and that the defendant and his property should be exempt from all liability for its debts and obligations, and that neither said corporation nor its officers or agents should have power to subject the defendant or the other stockholders of said corporation to any personal liability for any debts or obligations of said company; that at said times and at the time of the organization of said company and upon the 5th day of October, 1906 and the 16th day of November, 1906, and long subsequent thereto the defendant had no knowledge or notice and was ignorant that any

> provisions of the Constitution or laws of the State of California imposed or purported to impose any personal liability upon stockholders of foreign corporations doing business in the State of California to creditors thereof, but on the contrary was advised and verily believed that as a result of his subscribing to and receiving stock in the said Wentworth Hotel Company paid for by him as aforesaid, he would assume no personal liability to any creditors of said corporation upon any obligations that might thereafter accrue and upon the face of such belief and advice and in reliance upon his agreement with the said corporation and the incorporators and stockholders thereof and upon the provisions of the said certificate of incorporation and of the laws of Arizona the defendant subscribed and paid for said capital stock as aforesaid" (Findings IV and V, Record, pp. 29-30).

After its incorporation the Wentworth Hotel Company filed certified copies of its Articles of Incorporation in the office of the Secretary of State of California and in the County Clerk's office in Los Angeles County in that State. And the Court has found that the plaintiff and his assignors, the First National Bank of Pasadena and the Union Savings Bank of Pasadena,

> "had full notice of the provisions of said Certificate of Incorporation and that under the laws pursuant to which said Wentworth Hotel Company was incorporated and by virtue of the agreement of the incorporators and stockholders thereof said stockholders and this defendant were not subject and could not be subjected to any personal liability for any debts or liabilities of the said corporation or to any creditors thereof" (Finding VI, Record p. 30).

Thereafter the Wentworth Hotel Company transacted business in California until July 12th, 1907, when it was adjudged insolvent and an assignee in insolvency was appointed to whom the property of the company was assigned (Findings VI, VII, Record pp. 30-31).

The notes upon which the plaintiff seeks to recover he holds for the benefit of his assignors the First National Bank of Pasadena and the Union Savings Bank of Pasadena, respectively (Finding XII, Record p. 32).

The note of the First National Bank of Pasadena was for $22,500, dated October 5th, 1906, and payable thirty days thereafter to the order of the Bank "at its banking house in the City of Pasadena" (Finding VIII, Record p. 31).

The note of the Union Savings Bank of Pasadena was for $25,000, dated November 16th, 1906, payable one day after date to the order of that bank "at its banking house in Pasadena" (Finding X, Record p. 32).

When the note of the First National Bank fell due on November 4th, 1906, the bank held on deposit to the credit of the Wentworth Hotel Company upwards of $28,000, but failed to charge the note to the account nor did it do so subsequently although the deposits of the Wentworth Hotel Company repeatedly exceeded the amount of the note between the date of its maturity and January 18th, 1907. These deposits the Hotel Company was permitted to withdraw without paying or securing the note. (Finding XIV, Record pp. 32-33).

When the note of the Union Savings Bank fell due on November 17th, 1906, that bank held on deposit to the credit of the Wentworth Hotel

Company upwards of $10,000 and as late as January 17th, 1907, had on deposit $24,954.89, but failed to charge the note to the account and permitted the deposits to be withdrawn without securing payment of the note (Finding XV, Record pp. 33-34).

The notes having been assigned to the plaintiff he brought suit against the Wentworth Hotel Company prior to May 24th, 1907, when the Company's property was worth upwards of $450,000. and after the assignment in insolvency proved his claim upon them with the assignee (Findings XVI and XVII, Record pp. 34-35).

Counsel for the petitioner, the plaintiff below, rely upon *Pinney* v. *Nelson*, 183 U. S. 144, as an authority establishing the plaintiff's right to a recovery.

We maintain—

(a) That *Pinney* v. *Nelson* is not here a controlling authority in the plaintiff's favor, whether regard be had to the point decided or to the opinion there expressed as to the basis of the liability which the California court had enforced.

(b) That in the present case the defendant below by becoming a stockholder in the Wentworth Hotel Company did not contract with reference to or assume any obligation under the laws of California and as a stockholder in the Company did not become liable to its creditors upon debts which the company subsequently contracted in California.

(c) That the California statute could not and did not impose upon the defendant below, a non-

resident of California and not subject to its jurisdiction, any liability to the creditors of the Wentworth Hotel Company for debts incurred by the Company while doing business in that State; and, as a minor point,

(d) That, as the notes here in question were payable at the banking houses of plaintiff's assignors, the banks in question were bound to apply to the payment of the notes at maturity the deposits then or thereafter on hand and applicable thereto, and having failed to do so are not entitled to charge the defendant for the resulting loss.

POINTS.

I.—The decision in Pinney v. Nelson, 183 U. S. 144, does not establish the right of the petitioner, the plaintiff below, to a recovery.

In view of the reliance of the petitioner upon the case referred to as a decisive authority in his favor, it is important to consider just what was there decided and the true basis and effect of the opinion there expressed.

The *Pinney* case was brought before this Court on a writ of error to review a judgment of the Superior Court of Los Angeles County, California.

The action below was originally brought in the Justice's Court in Los Angeles and was subse-

quently transferred to the Superior Court of the County. It was there tried by the Court without a jury. The facts alleged in the complaint and answer were admitted and the parties stipulated

> "that the only question in this case is as to whether Section 322 of the Civil Code of California is in violation of the provisions of the Constitution of the United States, and if it is in violation of such provisions defendants are entitled to judgment, but if said section is not in violation of said provisions, then plaintiff is entitled to judgment as prayed for in his complaint." (183 U. S. on p. 144, Pinney Rec., p. 14.)

The Trial Court made certain findings of fact in accordance with the parties' stipulations, among them being that the Los Angeles Iron & Steel Company was incorporated in March, 1893, under the Laws of the State of Colorado, its Articles of Incorporation providing *inter alia* that the company

> "*is created for the purpose of carrying on part of its business beyond the limits of the State of Colorado* and the principal office of said company, in the State shall be kept at the City of Denver, Arapahoe County, *and the principal plant and principal operations of said company beyond the limits of the State shall be in Los Angeles County, State of California, and such other places in the State of California* as may be decided upon by the Board of Directors." (183 U. S. on p. 145, Pinney Rec., p. 15.)

The court also found that *the defendants in the action were and had at all times been residents and citizens of California;* (183 U. S. on p. 145).

By their answer the defendants alleged that Section 322 of the Civil Code of California was invalid and in violation of the provisions of Article I, Section 10, and Article XIV, Section 3, of the United States Constitution relating to laws impairing the obligations of contract, abridging the privileges or immunities of citizens of the United States, depriving persons of life, liberty or property without due process of law and denying to persons within the jurisdiction of the State the equal protection of the laws (Pinney Rec., p. 14).

This issue as to the constitutionality of the statute, the Trial Court decided in favor of the plaintiff awarding judgment to him against the various defendants in amounts ranging from $61.02 to $251.43, all aggregating $770.85, an amount so small as to preclude a review by the Supreme Court of the State.

That this question of constitutionality was the only question decided by the California court appears from the certificate of the Trial Judge allowing the writ of error, which was in part as follows:

> "The only question decided in said case having been whether the provisions of Section 322 of the Civil Code of California are in conflict with the Constitution of the United States, and therefore invalid, and the decision and judgment in this case resting entirely upon the decision of this court that the said section is not in conflict with the provisions of the Constitution of the United States.
>
> * * *
>
> And it appearing that the question presented in the said case is a Federal question—
>
> It is ordered that the writ of error hereto annexed be allowed", etc. (Pinney, Rec. pp. 1-2).

The sole question presented to the Supreme Court for its determination was the federal question,—whether the State Statute was in violation of any of the provisions of the United States Constitution which had been relied upon in the court below.

The State Court had decided no other question, and had it done so its decision in that respect would not have been open to review.

> *Mobile, etc., R. R. Co.* v. *State of Mississippi*, 210 U. S. 187, 204-205.
> *Eustis* v. *Bolles*, 150 U. S. 361.
> *Leonard* v. *Vicksburg, etc., R. R. Co.*, 198 U. S. 416, 422-423.

The case was not argued in the Supreme Court. It was submitted upon briefs discussing the federal question raised of the constitutionality of the statute. Some reference by counsel for plaintiff in error was made to the effect of the statute against non-residents of California, but counsel for the defendant in error insisted, and properly, that the only question that could be raised was whether or not the court below erred in deciding upon the record that the statute was not unconstitutional as to the defendants below, that is, as to residents of California (see Brief for Defendants in Error, pp. 7-8, Pinney Rec. pp. 4, 15).

That the "federal question" was correctly decided by the Trial Court, as this Court held, is sufficiently obvious.

The statute attacked did not impair the obligation of the defendants' contract, for the statute had been in force since 1876, while the corporation there in question, the Los Angeles Iron & Steel Company, was organized under the Colo-

rado Law in 1893. The obligation of a contract cannot be impaired by a law in force at the time the contract is made. Whether that law be applicable is quite a different question.

The statute did not "abridge the privileges or immunities of citizens of the United States", at least as regards the defendants there before the court,—residents of California,—for the State obviously could prescribe the terms upon which its own citizens should be permitted to take stock in a foreign corporation engaged in business in the State.

It did not deprive the defendants "of life, liberty or property without due process of law", for they had their day in court, were permitted to be heard and judgment in due course was rendered against them. Whether the parties' stipulation for judgment was illadvised or not, certainly there was within the meaning of the Constitution "due process of law."

Nor did the State of California by this statute "deny to any person within its jurisdiction the equal protection of the laws." The statute, whether penal or not and whether applicable to or enforceable against non-residents of the State, certainly did not discriminate as to the persons within the jurisdiction of the State, that is, as to residents in or citizens of the State. All such were equally subject to its provisions.

It would seem that the further discussion by the Court as to the grounds upon which a stockholder in a foreign corporation, doing business in California, might be held liable under the California statute related to a question the determination of which was not necessary to the decision of the case then under consideration. The

present case squarely presents the question of the existence of such a liability enforceable outside of California against a non-resident stockholder in a corporation organized under the laws of Arizona, with articles expressly stipulating against any such liability. We submit that the opinion expressed by the court upon this question, even if construed as the plaintiff here claims, is not a controlling authority in favor of his right to a recovery upon the present record.

As Chief Justice Marshall said in *Cohens* v. *Virginia*, 6 Wheat. 264, pages 399-400:

> "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision".

See to the same effect,

Carroll v. *Lessees of Carroll*, 16 How. 275, 286-7.
Northern Bank v. *Porter Township*, 110 U. S. 608, 615.
Hans v. *Louisiana*, 134 U. S. 1, 20.
Leisy v. *Hardin*, 135 U. S. 100, 135.
Pollock v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 574-575.
United States v. *Wong Kim Ark*, 169 U. S. 649, 678-679.
Harriman v. *Northern Securities Co.*, 197 U. S. 244, 291.

As we read the opinion in the *Pinney* case, however, it is not inconsistent with, but rather sup-

ports the decision of the court below upon the present record.

As we understand it, the court in that case sought merely to apply to the particular facts there presented the principles relating to conflict of laws which had been elaborately discussed and expounded in the leading cases of *Pritchard* v. *Norton*, 106 U. S. 124, and *Liverpool Steam Co.* v. *Phoenix Insurance Co.*, 129 U. S. 397, upon which the court relied. In these cases, and also in the *Pinney* case, the Court undertook merely to determine by what law the contracting parties intended or might justly be presumed to have intended that their obligation should be governed. Such an intent may be expressed or may be inferred from the circumstances, but it must be an intent which may fairly be inferred, which is consistent with the terms of the parties' contract, and which presumably they would actually have entertained had the matter been brought to their attention at the time they entered into their engagements (cf. Dicey's Conflict of Laws, 2nd ed. p. 62 and pp. 529, 556-557). We do not understand that the court in the *Pinney* case held the contrary.

If the parties expressly stipulate that their contract is to be governed by the laws of the jurisdiction in which it is made, or if the contract contains a provision valid under those laws, but invalid under the laws of a neighboring jurisdiction, it cannot *fairly* be inferred or presumed that the parties *intended* their contract to be governed by the laws of the other jurisdiction.

This principle was recognized in the *Pritchard* case. The court there quoted the statement from *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115, 120, to the ef-

fect that "it is necessary to consider by what general laws the parties intend that the transaction should be governed, or rather by what general law it is just to presume that they have submitted themselves in the matter", and added (106 U. S. 124, on p. 137):

> "It is upon this ground that the presumption rests that the contract is to be performed at the place where it is made, and to be governed by its laws, there being nothing in its terms or in the explanatory circumstances of its execution inconsistent with that intention.
>
> So Philimore says, 'It is always to be remembered that in obligations it is the will of the contracting parties, and not the law, which fixes the place of fulfillment—whether that place be fixed by *express words* or by *tacit implication*—as the place to the jurisdiction of which the contracting parties elect to submit themselves' (4 Int. Law 469).
>
> The same author concludes his discussion of the particular topic as follows: 'As all the foregoing rules rest upon the presumption that the obligor has voluntarily submitted himself to a particular local law, that presumption may be rebutted either by an express declaration to the contrary or by the fact that the obligation is illegal by that particular law, though legal by another. The parties cannot be presumed to have contemplated a law which would defeat their engagements' (4 Int. Law, sect. DCIV, pp. 470, 471).
>
> This rule, if universally applicable, which perhaps it is not, though founded on the maxim *ut res magis valeat quam pereat*, would be decisive of the present controversy, as conclusive of the question of the application of the law of Louisiana, by which alone the undertaking of the obligor can be upheld.

> *At all events, it is a circumstance highly persuasive in its character, of the presumed intention of the parties, and entitled to prevail, unless controlled by more express and positive proof of a contrary intent.*" (Italics ours.)

So in *Liverpool Steam Co.* v. *Phoenix Insurance Co.*, 129 U. S., 397, after a full review of the authorities, this court in interpreting a contract of affreightment pointed out (p. 453) that the court had often affirmed and acted on the "general rule that contracts are to be governed as to their nature, their validity and their interpretation by the law of the place where they were made, unless the contracting parties clearly appear to have had some other law in view", and stated the result of its review of the authorities as follows (p. 458):

> "This review of the principal cases demonstrates that, according to the great preponderance, if not the uniform concurrence of authority, the general rule, that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment made in one country, between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, *clearly manifest a mutual intention that it shall be governed by the law of some other country*" (italics ours).

In *Pinney* v. *Nelson* the court dealt with a special and peculiar case upon the facts. Its discussion was with reference to a judgment of a Califor-

nia court against citizens and residents of that State who had become stockholders in a Colorado corporation organized under a charter expressly providing that the company was created "*for the purpose*" of carrying on part of its business beyond the limits of the State of Colorado and that the principal plant and principal operations of the company beyond the limits of the State should be in California. The other provisions of the charter were not before the court. It did not appear that the charter referred to the laws of Colorado or that it contained any express provision exempting the stockholders from liability to creditors. Apparently there was no such provision; the defendants relied merely upon the admitted allegation that there was no Colorado statute providing for such liability and that under the Colorado law a stockholder of a corporation was not liable for the company's indebtedness.

Upon this special case and meagre record, the court said that the contract of the stockholders with one another by which the corporation is created, is presumed to have been made with reference to the laws of the State of its incorporation, "*nothing being said in the charter to the contrary*", but that it is "*competent* for the stockholders in making their charter to contract with reference to the laws of the State in which they propose the corporation shall do business" (183 U. S. on p. 150). As to that particular case the court said:

> "The stockholders in their charter specified that the purpose of the corporation was partly business beyond the limits of Colorado and that the principal part of such outside business should be carried on in California.

> Not content to rely upon the general authority which by the rules of comity the Colorado corporation would have to enter California and transact business therein they in terms set forth that a part of the purpose of the incorporation was the transaction of business by the corporation in California. Now when they in terms specify that they were framing a corporation for the purpose of having that corporation do business in California *is it not clear that they were contracting with reference to the laws of that state?*" (*ibid.* italics ours).

And the court concluded that when a corporation is formed in one state and "by the express terms of its charter it is created for doing business in another state and business is done in that state it must be assumed that the charter contract was made with reference to" the laws of the latter state.

This assumption or inference is expressly based upon the special and peculiar provision of the charter there under consideration, that the company was "created for doing business" in the other State. The court did not hold that the stockholders would have been liable in the absence of such an express charter provision; nor, we submit, did they hold that if such an inference or assumption were inconsistent with the other provisions of the charter, or if it clearly appeared upon a fair construction of the charter that the parties in fact contracted "with a view to" or "with reference to" the laws of the incorporating State, the court must nevertheless assume the contrary in order to impose upon the stockholders a liability which they never agreed to assume and from which they

were exempt by the laws of the incorporating State and by the company's express charter provisions. (See *Risdon Iron & Locomotive Works* v. *Furness*, L. R. (1905), 1 K. B. 304, 314-315, s. c. L. R. (1906) 1 K. B. 49, 57-58; *Thomas* v. *Matthiessen*, 192 Fed. 495, 497-498).

That in the present case the incorporators and stockholders of the Wentworth Hotel Company in fact contracted "with a view to" and "with reference to" the laws of Arizona, and not of California, and intended their obligations to be governed by the laws of Arizona, is entirely clear and has in effect been stipulated and found.

The charter did not provide that the company was organized "for the purpose" of doing part of its business in California, or that the "principal plant and principal operations of the company beyond the limits of the State" should be in California.

On the contrary, it stated that the incorporators associated themselves together "*for the purpose of forming a corporation under the laws of Arizona.*" It stated, it is true, that the principal place of the company outside of Arizona was to be in California, but the company was empowered to do many things and to conduct its operations not only in Arizona and California, but in any "*State, Territory or colony of the United States and in all foreign countries and places.*"

That the company's affairs were to be conducted under and with reference to the laws of Arizona was expressly stipulated; for the directors were authorized to make necessary rules for the management of the company and its affairs "*consistent with these Articles of Incorporation*

and in accordance with the laws of the United States and the laws of the Territory of Arizona."

And finally, it was stipulated that the capital stock should be non-assessable, and that the private property of the stockholders in the company should be forever *"exempt from all liability for its debts and obligations"* (Record, pp. 12-15).

These stipulations were permitted by the Arizona law, (Laws of Arizona 1903, No. 88, Sec. 7), and when made were intended to be and were valid, although if inserted in the charter of a California corporation they would doubtless have been ineffective.

The Arizona statute referred to relates to the formation of corporations and prescribes the provisions which the articles of incorporation must contain. Section VII, relating to exemption of private property from liability, is as follows:

> "VII. Whether private property is to be exempt from corporate debts. Unless so exempted, stockholders are liable for the debts of the corporation in the proportion to which their stock bears to the whole capital stock."

As a matter of construction of this charter, or of fair inference as to the intent of the incorporators, or stockholders, it is clear beyond question that the Wentworth Hotel Company was incorporated and the incorporators and stockholders contracted under and "with a view to" and "with reference to" the laws of Arizona and not of California.

And if upon the principles announced in *Pritchard* v. *Norton* (*supra*) and *Liverpool Steam Co.* v. *Phoenix Insurance Co.* (*supra*) the court was

justified in the *Pinney* case in assuming an intent on the part of the stockholders to contract with reference to the California law, upon the same principles, in view of the difference in the provisions of the charter in the present case, the court below, (even had the parties not stipulated the fact), would have been bound to find, as it did, that the stockholders in the Wentworth Hotel Company intended their obligations to be governed by the laws of Arizona and by the provisions of the charter of the company framed thereunder.

In a case like the present, the trial below having been by the court without a jury, these findings of fact, like a special verdict under the common law practice, are findings of the ultimate facts and no inferences of fact to the contrary, or which have not been expressly found, are permissible. If these findings support the conclusions of the court, its judgment must stand.

As the court (Mr. Justice Miller) said with reference to such a special finding in *Norris* v. *Jackson,* 9 Wall. 125, on pp. 127-8:

> "It is not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties, a finding of the propositions of fact which the evidence establishes and not the evidence on which those ultimate facts are supposed to rest.
>
> The next thing to be observed is that whether the finding be general or special, it shall have the same effect as the verdict of a jury, that is to say, it is conclusive as to the facts so found. * * *
>
> In the case of a special verdict the question is presented, as it would be if tried by a jury, whether the facts thus found require a judg-

ment for plaintiff or defendant; and this being matter of law, the ruling of the court on it can be reviewed in this court on that record."

And see,

Miller v. *Life Ins. Co.*, 12 Wall, 285, on p. 297.
Raimond v. *Terre Bonne Parish*, 132 U. S. 192, on p. 194.
Collins v. *Riley*, 104 U. S. 322, 327.

Counsel for the petitioner argue that all that was required to subject the defendant to liability was proof of an intent on the part of the stockholders that the corporation should transact business in California and that then "the law reads into their contract an agreement to assume such personal liability as is imposed by the law of the named State so far as relates to business transacted therein by the corporation" (Brief for Petitioner, p. 22). And in support of this argument they suggest that the statutory liability of stockholders is in fact *quasi* contractual, and "attaches without regard to the stockholder's intent," referring to the definition of "*quasi* contract," as given by Judge Keener in his well-known treatise (Petitioner's Brief, pp. 24-5).

But in this aspect the liability which the plaintiff seeks to enforce is no longer in any just sense "contractual" and enforceable outside of California or against non-residents of that State. It becomes a liability created by and dependent solely upon the mandate of the law. Any intent on the part of the stockholder actually existing or which might fairly be inferred from the articles of

incorporation taken as a whole becomes entirely immaterial.

And unless the charter as a whole is to be fairly construed to determine the law subject to which the incorporators intended to contract, the presence or absence in the articles of a provision that the corporation may do business or is organized for the purpose of doing business in a foreign state would seem to be of no importance. Any other circumstance might as well be fixed upon as the *occasion* rather than the *reason* for imposing the liabilities provided for in the foreign statute. The court might with equal propriety hold that a New York stockholder in a New Jersey corporation was liable under the California law because the corporation had done business in that state whether its articles expressly provided for an office in San Francisco or not. In either case the Court in New York or New Jersey in order to charge the stockholder must necessarily enforce a liability under the California statute having no contractual basis whatever.

Considered from this point of view we may properly ask what law reads into the contract of the incorporators and stockholders an agreement to assume a liability under the California statute which is inconsistent with their actual intent and with the express stipulations of the charter. Certainly not the law of Arizona, for under that law the stockholders when the company was formed were subject to no liability to creditors. Nor can it be the law of California, for when the Company was formed in Arizona and the defendant below subscribed for his stock he was not a resident of California or subject to the mandate of its laws. That State could not as against the will of the

parties extend the effect of its law to their contract when made in Arizona. And when later the company acquired property and did business in California Mr. Matthiessen did not become subject to the jurisdiction of that State. The question of his liability or non-liability under the California law when sued in the present action in New York necessarily depended upon whether the trial court below could in accordance with established principles of the common law and of the law of conflicts find a *contractual* obligation. None other was there enforceable. Such an obligation could not be found unless upon a fair construction of the articles of incorporation as a whole it could fairly be inferred that the incorporators and stockholders intended their obligations to be controlled by the laws of California instead of Arizona. The court in New York was not entitled in this case, any more than in any other case involving the construction of a contract, to "read into the contract" an agreement which obviously the parties did not contemplate or make and which would flatly contradict the express terms of the written charter. (cf. *Grover & Baker Machine Co.* v. *Radcliffe,* 137 U. S. 287, 299).

It does not help to refer to the obligation as *quasi* contractual. Obligations imposed by law are sometimes so described but with the exception of the common law duty of a defendant, who has been unjustly enriched, to make amends, *quasi* contractual obligations are dependent on the mandate of a court as evidenced by its judgment or upon a statutory duty which a sovereign imposes upon those who are subject to its command (Keener Quasi Contracts, p. 16). Here there is

no suggestion of unjust enrichment and no judgment or statute could reach the defendant to impose a duty upon him unless he was subject to the jurisdiction of the court rendering the judgment or of the state which enacted the statute.

Buchanan v. *Rucker*, 9 East., 192.
Pennoyer v. *Neff*, 95 U. S., 714, 722.
Huntington v. *Attrill*, 146 U. S. 657, 669.
Freeman v. *Alderson*, 119 U. S. 185, 188.

The case is in no way analogous to that suggested by counsel (Petitioner's brief, p. 25) of a non-resident stockholder in a domestic corporation who is subsequently charged with liability under the law of the state in which the Company is incorporated of which when he took his stock he may have had no actual knowledge.

The right of a corporation to exist rests upon and is derived from the laws of the incorporating state and its powers are conferred upon it by those laws subject to such restrictions and limitations as they may prescribe (*Canada Southern R. R. Co.* v. *Gebhard*, 109 U. S. 527 on p. 537). The stockholder also acquires his right to membership in the corporation and his *status* as a stockholder under the laws of the incorporating state and subject to the conditions, limitations and liabilities which those laws prescribe (*Nashua Savings Bank* v. *Anglo-American Co.*, 189 U. S. 221 on p. 320; *Christopher* v. *Norvell*, 201 U. S. 216, 228-230). And he may properly enough be said to have agreed to assume those liabilities for they are necessarily involved in his agreement to take the stock and thereby assume the *status* of a stockholder in the Company.

But in the present case, when Mr. Matthiessen subscribed for his stock in the Arizona corpora-

tion, he acquired no *status* or rights dependent upon or conferred by the California law. Had the Wentworth Hotel Co. never done business in California it would hardly be suggested that any liability under the California statutes would attach to or be enforceable against him. His rights and liabilities would have been those secured to or imposed upon him by the law of Arizona. But the fact that the Company later did business in California in no way changed or affected his position as a stockholder in the Arizona Company or the rights or liabilities to which he was entitled and subject under those laws. When the Wentworth Hotel Co. did business in California, it did not bring the defendant, a non-resident stockholder, into that state or subject him to the process of its courts or to the mandates of its statutes (*Conley* v. *Mathiesen Alkali Works*, 190 U. S. 406; *People* v. *American Bell Telephone Co.*, 117 N. Y. 241, 255). California could not penalize him for what the company might do or fail to do, nor could it by statute impose upon him liabilities enforceable outside that state, unless it could fairly be said that under the rules of the common law as generally recognized and applied he had expressly or by fair implication agreed to assume them. And here it appears and has been found that he had not.

Counsel's attempt to reconcile the provision of the charter of the Hotel Company exempting its stockholders from liability with the existence of such a liability under the California law (Petitioner's brief, pp. 25-26) is hardly successful. It certainly is not a fair construction to put upon the charter taken by itself to read the absolute

exemption from liability to creditors as an exemption limited to creditors other than those whose debts were contracted in California. Moreover, there is no occasion to attempt such a "reconciliation" unless the California law be incorporated into the charter as creating and measuring the liabilities of the stockholders. It cannot be so incorporated unless in accordance with the presumed intent of the stockholders to assume the obligations it prescribed, and this cannot properly be presumed where the parties have stipulated expressly to the contrary. It is true that in the California case relied on (*Thomas* v. *Wentworth Hotel Co.*, 158 Cal. 275), the California Court undertook to read into the charter of the Hotel Company the California statute although apparently limiting its effect to transactions connected with business done in that state,—a limitation which the statute itself does not recognize. But the California court was there dealing with its own citizens who had been such at the time they became stockholders in the company, and its determination to hold them liable under the statute to which they personally were subject, can hardly be regarded as sufficient authority for a New York court to "read into the charter" a California law which is inconsistent with and would nullify the express charter provisions.

The suggestion that the incorporators of the Wentworth Hotel Company may have proceeded with a view to "evading" the California law (petitioner's brief, pp. 23-26), requires little consideration. Such a suggestion adds nothing to nor does it detract anything from the force of our argument (*U. S.* v. *Isham*, 17 Wal. 496, 506). Whether

such a consideration may have influenced the court in the *Pinney* case where the stockholders apparently were all residents of California, we do not know. That it did, does not appear from the opinion. But certainly nothing can be made of such an argument in the present case as against the defendant Matthiessen, for the parties have stipulated and the court has found that at the time he subscribed for and acquired his stock and at the time the indebtedness here in question was contracted by the Company Mr. Matthiessen had no knowledge or notice that any provisions of the constitution or laws of California imposed or purported to impose any personal liability upon stockholders of foreign corporations doing business in that state, to creditors thereof (Rec., Finding V, p. 30).

The plaintiff here necessarily contends for the rule, that if a corporation by its charter is empowered to have a place of busines and to do business in a named foreign State, and if its incorporators contemplate or intend that that power will probably be exercised, not only the incorporators, but all present and future stockholders, wherever they may reside, are, as matter of law and regardless of their intent, agreement or understanding, subject to the liabilities which the laws of such foreign State attempt to impose upon stock holders in foreign corporations (see Petitioner's brief p. 22).

No court outside of California has ever considered that the *Pinney* case declared or was authority for any such rule of liability.

In the *Risdon* case (L.R. 1905, 1 K.B. 304; L.R. 1906, 1 K.B. 49) the Company had power to do

business anywhere and particularly in the United States. The Court declined to find that the stockholders had agreed to assume any liability under the California statute or had authorized the company or its officers to pledge their credit to California creditors.

In *Coulter Dry Goods Co.* v. *Rosenbaum*, 74 Misc. (N. Y.) 579 the Court declined to charge a stockholder in the Wentworth Hotel Co., holding that the liability under the California statute was not enforceable except by the California courts.

And in the present case the courts below have considered that the *Pinney* case did not require them to hold that the stockholders here had *contracted* to assume a liability inconsistent with the express provisions of the charter (170 Fed. R. 362; 192 Fed. R. 495).

Indeed, we believe that no stockholder in any foreign corporation which has done business in California, has ever been charged with liability under the California statute outside that State, and that no such stockholder who was not a resident of California has ever been held liable even in California.

The question of the existence or enforceability of any such liability has, we believe, apart from the present case, been considered or discussed only in the *Pinney*, the *Risdon* and the *Coulter Dry Goods Co.* cases, in the two California cases *Thomas* v. *Wentworth Hotel Co.*, 158 Cal. 275, and *Peck* v. *Noee*, 154 Cal. 351, and in *Thomas* v. *Wentworth Hotel Co.*, 16 Cal. App. 403. The case of *State* v. *New Orleans Warehouse Co.*, 109 La. 72, cited by counsel involved no question of stockholder's liability and has no bearing upon the present discussion.

In *Peck* v. *Noee, supra,* and *Thomas* v. *Wentworth Hotel Co.*, 158 Cal. 275, the California court relied upon the *Pinney* case, and in the *Thomas* case, 16 Cal. App. 403, the lower court merely followed the decision of the California Supreme Court. But all those cases involved merely the enforcement of the statute by the California courts against citizens and residents of that State. The court was not required to consider nicely whether the liability enforced was penal, statutory or contractual. It may well be that the statutory obligation is effective and enforceable against those who by residence in the State are subject to those laws, whether the obligation be contractual or not. And the fact that California courts hold California residents to be bound by the statute, cannot be regarded as an authoritative *decision* that non-residents of the State have *contracted* to assume the liability and can be charged upon it in other jurisdictions.

This rule of liability for which the plaintiff contends we submit finds no support in either the decision or opinion in the *Pinney* case. And it is a rule which, as we shall see (Points II and III *infra*), is highly artificial, and opposed to settled principles of the law and to sound public policy.

Such a rule would logically require not only that stockholders of a New York corporation, authorized and intended to do business in California, should be held liable under the California law, but that, *e converso,* stockholders in a California corporation authorized and intended to do business to New York should be exempt from liability,—at least upon debts contracted in New York.

So, too, under this suggested rule of liability, in case a New York corporation in accordance with the terms of its charter and with the intent of its incorporators, established offices and did business in various States including California, Colorado and Minnesota, it would seem logically to follow that a subsequent stockholder who might have bought his stock on the exchange with no knowledge of the charter provisions or of the laws of the States mentioned, would become liable to California creditors for a proportionate part of their debts, to Minnesota creditors perhaps for such amount of the company's indebtedness as the Minnesota court might see fit to assess against him, and under the Colorado law,—in case the company had neglected to file there a copy of its charter,—for all the company's debts contracted in that State (cf. *Leyner Engineering Works* v. *Kempner*, 163 Fed. R. 605).

Nor do we see upon what ground such a rule of liability, if adopted, could logically be limited to corporations whose charters named a particular foreign State as one in which business is to be done. There is no magic in a name. If the only purpose of designating a particular State by name in the charter is to show an intent that business should be done in that State (see Petitioner's brief p. 22), that intent may quite as effectively be shown by a provision that the company is to maintain offices and transact its business in all or any of the States of the United States, or in the States west of the Mississippi, or in such of the States as the Board of Directors may determine.

The adoption of any such rule of liability it should be noted, is quite unnecessary in order to

enable a particular State to give effect to local views of public policy as to the admission of foreign corporations to do business in the State. Any corporation not engaged in interstate commerce may be refused admission to or may be driven from the State. Its local business may be destroyed by taxation; its local contracts may be invalidated; it may be refused access to the courts; its officers and agents may be penalized for conducting business within the State. Indeed, in the present case it was competent for California to have refused to permit the Wentworth Hotel Company to file a copy of its charter or to do business in the State in view of the fact that the charter exempted the stockholders from liability to creditors. California had full power to deal with the corporation which came within the State and transacted business over which the State had jurisdiction. It was and is quite unnecessary, in order to maintain the dignity of that State and its powers over matters within its jurisdiction, to hold arbitrarily that non-resident stockholders in the company, who have never been subject to the jurisdiction of California or of its laws may be charged in other jurisdictions with a liability which in fact they cannot fairly be said to have assumed and which is contrary to the express provisions of their charter contract.

The question presented is an important one. Much of the business of the country is to-day conducted by corporations and much of its wealth is invested in corporate stocks. Many corporations transact business throughout the country and many have places of business in many States other than those in which they are incorporated. Such conduct of business in the different States

is, often expressly, and always impliedly authorized by the terms of the corporate charter, and was intended or contemplated by the incorporators and original stockholders. If under any such rule of liability as the plaintiff here contends for innocent stockholders are chargeable not merely with the liabilities imposed by the law of the domicil of the corporation, but as well with the varying liabilities prescribed by the laws of the various States where the corporation under its charter powers, may engage in business, then as the court below well said:

> "Corporate stock is liable to become in this country an uncertain and even dangerous asset."
>
> *Thomas* v. *Matthiessen*, 192 Fed. R. 495, on p. 498.

See also

> *Leyner Engineering Works* v. *Kempner*, 163 Fed. R. 605, 608.

II.—The defendant when he subscribed for his stock contracted with reference to the laws of Arizona. He did not agree to assume any liabilities under the California law. And the debts, which the Hotel Company subsequently contracted in California, were not binding upon or enforceable against him as contractual obligations.

The parties have stipulated and the court has found, as *ultimate* facts in the case, that Mr. Mat-

thiessen and the incorporators and stockholders of the Wentworth Hotel Company intended that their obligations should be controlled and determined by the articles of incorporation of the company and by the laws of Arizona; that they agreed that the stock should be non-assessable, that the defendant should be exempt from liability for the Company's debts or obligations and that neither the Company nor its officers or agents could subject the stockholders to any personal liability upon such obligations. It was further stipulated and found that the defendant when he subscribed for his stock and when the debts here in question were contracted had no notice that the laws of California purported to impose any personal liability on stockholders in foreign corporations doing business in that state, but was advised and believed that by subscribing for and receiving his stock he would assume no personal liability to any creditors of the company, and that he took his stock in reliance upon that belief and upon the provisions of the certificate of incorporation and the laws of Arizona (Record Findings IV and V, pp. 29-30).

As we have seen (*supra*, pp. 21-22) the provisions of the articles of incorporation are entirely inconsistent with any intent upon the part of the incorporators to contract with reference to the law of California as controlling their obligations.

The mere fact that the articles provided that the principal place of the company outside of Arizona should be in California is not sufficient to overcome the inference as to the intent of the incorporators to contract with reference to the laws of Arizona which is abundantly apparent upon the face of the charter.

It seems to us obvious that the obligations of stockholders in a corporation to its creditors are not to be controlled by preliminary talks, writings or negotiations nor by any intent which is not fairly expressed or indicated in the formal articles of incorporation; but, if we are to go outside of that, the present case is completely disposed of by the findings, since the intent of the incorporators and subscribers that the company should have power to erect a hotel in California and probably would do so is not inconsistent with the finding that nevertheless they intended their obligations to be controlled by the Arizona law.

Upon the facts as found the case is one falling within the rule that the incorporators and stockholders are presumed to contract with reference to the laws of the State in which the corporation is incorporated and that their rights and obligations with reference to the company and its creditors are regulated and controlled by those laws. Those are the laws which necessarily create and control the corporation, and which confer upon it its powers and prescribe the conditions and limitations attaching to them. It is to those laws that the stockholders necessarily must resort to determine how the affairs of the company may lawfully be conducted, the mode in which its directors or other managers are to be chosen and the powers which they may lawfully exercise. Those are the laws alone which permit the subscribers for or purchasers of stock in the company to become stockholders in or members of the corporation, and which determine the rights inhering in such membership and the extent of the obligations or liabilities resulting therefrom (see

Christopher v. *Norvell,* 201 U. S. 216, on pp. 226-230).

The laws of a foreign State in which the company may attempt to do business may prevent the doing of business or limit the exercise of the corporate powers. (*Relfe* v. *Rundle,* 103 U. S. 222,, 226.) But such laws obviously cannot enlarge the powers of the corporation or provide for the conduct of its business in a way which is not permitted by the law of its incorporation. Nor can such laws affect the position of the stockholders in the company by enlarging, limiting or modifying their rights as members of the corporation or by altering their liabilities to its creditors as fixed by the law under and subject to which they became stockholders (cf. *Railway Co.* v. *Allerton,* 18 Wall. 233, 235-236; *Christopher* v. *Norvell,* 201 U. S. 216, 226-230; *Miles* v. *Woodward,* 115 Cal. 308, 311).

It is conceded in the *Pinney* case that the contract of the stockholders by which the corporation is created is presumed to have been made with reference to the laws of the incorporating state "nothing being said in the charter to the contrary" (183 U. S. on p. 150). With the exception of what the court in that case said as to the effect of the special facts there considered, it has, we believe, never been held outside of California, that the contract of a shareholder in a corporation can be considered to have been made with reference to, or his rights and obligations as a stockholder to be controlled or determined by, any law other than that under which the corporation is organized.

The rule generally recognized and applied is accurately stated by Mr. Morawetz in his book on Corporations, Sec. 874, as follows:

> "The contract of a shareholder is measured by the charter or constating instruments of the company in which he agrees to become a member. When a person agrees to become a shareholder in a corporation chartered by a foreign state he must necessarily be held to contract with reference to all the laws of that state which enter into the constitution of the company; and if the charter or incorporating act of the company provides that its shareholders shall be individually liable to creditors he will become individually liable to the same extent as any other member not because he is bound by the laws of the state where the com pany was incorporated, but because he has voluntarily agreed to the terms of the company's constitution. On the other hand if the constitution to which a corporator has agreed does not provide for individual liability to creditors he cannot be charged with individual liability anywhere. *A state would have no power to impose a liability upon the shareholders of foreign corporations unless they are within the jurisdiction of the state*" (italics ours).

In *Nashua Savings Bank* v. *Anglo-American Co.*, 189 U. S., 221 on p. 230, the court applied the rule, saying:

> "By subscribing to stock in a foreign corporation defendant subjected itself to the laws of such foreign country in respect to the powers and obligations of such corporation."

And in *Canada Southern R. R. Co.* v. *Gebhard*, 109 U. S. 527, the court held that even creditors of a foreign corporation purchasing its bonds

took them subject to the laws of the foreign government and to its power to readjust the indebtedness under a legislative reorganization. The court said (p. 537):

> "A corporation 'must dwell in the place of its creation and cannot migrate to another sovereignty' (*Bank of Augusta* v. *Earle*, 13 Pet. 588), though it may do business in all places where its charter allows and the local laws do not forbid (*Railroad* v. *Koontz*, 104 U. S. 112). But wherever it goes for business it carries its charter, as that is the law of its existence (*Relf* v. *Rundel*, 103 U. S. 226), and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever local control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. * * * Such being the law, it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers or obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy, which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. *He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony*" (italics ours).

See also,

Glenn v. *Liggett*, 135 U. S. 533, on p. 548.
Hawkins v. *Glenn*, 131 U. S. 319, 322.
Relfe v. *Rundle*, 103 U. S. 222, 226.
Converse v. *Hamilton*, 224 U. S. 243, on p. 253.
Christopher v. *Norvell*, 201 U. S. 216, 229.
O'Connor v. *Witherby*, 111 Cal. 523, 527.
Merrick v. *Van Santvoord*, 34 N. Y. 208, 216.
Converse v. *The Aetna Bank*, 79 Conn. 163, 169.
Risdon Locomotive Works v. *Furness*, L. R. 1906, 1 K. B. 49 S. C., L. R. 1905, 1 K. B. 304.
Leyner Engineering Works v. *Kempner*, 163 Fed. 605.

The rule was applied in the important case of *Risdon Iron & Locomotive Works* v. *Furness* (L. R. 1905, 1 K. B. 304, affirmed in the Court of Appeal, L. R. 1906, 1 K. B. 49), which is the only case we believe before the present in which an attempt has been made to enforce in courts other than those of California the statute of that State as against non-resident stockholders in foreign coprorations.

There the defendant was a shareholder in the "Copper King, Limited," an English joint stock company, the liability of the shareholders in which under the English law was limited. The objects for which the company was incorporated were among others:—

> "To acquire any copper or other mines in the United States of America, Australia and elsewhere;

To search for, crush, win, get and prepare for market ore and mineral substances of all kinds;

To purchase machinery and materials of every kind requisite for the purposes of the company."

The Articles further empowered the directors to,—

"do all such other things and take such steps as may be now or at any time become necessary so as to comply with any statutory enactment, rule or regulation in any country, colony or place where the company may carry on business or where all or any part of the property or undertaking of the company may be situated."

The company carried on business in the State of California and the action was brought to recover a part of the purchase price of machinery and goods there sold to it by the plaintiff. It was held that the plaintiff was not entitled to recover.

The learned Trial Judge said (L. R. 1905, 1 K. B. pp. 313-314):

"Whilst this company may under the articles trade and carry on business in any foreign country as therein set forth, and may do all things necessary and conducive to that end, and its directors may under Article 87 of the Articles of Association take all necessary and proper steps to comply on the part of the company, with the requirements of the law of a foreign country where the company carries on business, a proceeding on the part of the company to enlarge the boundary of the liability of a shareholder beyond the boundary fixed by the Constitution of the company must, in my view, be held in an English court to be *ultra vires*. Further, whatever be the

laws of a foreign country in which an English limited company carries on business, an English court at all events cannot, in my judgment, recognize as a valid cause of action a claim in respect of debts of the company, arising by virtue of those laws, which is inconsistent with the limitation of the shareholder's liability according to English law. *That limitation is the legal basis of the shareholder's relation to the company*" (italics ours).

And in distinguishing *Pinney* v. *Nelson*, the learned Judge further said (p. 315):

"Further—and this seems to me by itself to afford a material distinction if it were necessary to find one—the action in *Pinney* v. *Nelson* was an action brought in the State of California against stockholders of the corporation who were residents in and citizens of the State. The utmost that the opinion of the Supreme Court in *Pinney* v. *Nelson* can be cited to support is that where a company, in accordance with the express provisons of its constitution, trades in a foreign State, which has in regard to the personal liability of shareholders such laws as the State of California, those laws may properly be enforced in the courts of that State against a shareholder of the company who is properly within the jurisdiction of those courts."

In affirming this judgment on appeal (L. R. 1906, 1 K. B. 49) Collins, M. R., said (pp. 56-57):

"*Prima facie*, the provisions of the memorandum of association must be taken to give power to do things not inconsistent with the constitution of the company under the memorandum and articles of association, but it cannot be assumed that because there is liberty to trade in a foreign country, the company is released from the fundamental condition

which limits the liability of its members. To arrive at any other conclusion there must be something more than the fact that the company, which is a limited company, is authorized by its memorandum of association to do certain things. The authority to do these things is given to a limited company, and it can only do them subject to the limited liability of its shareholders, which is a fundamental condition of its existence."

And Romer, L. J. said (pp. 58-59):

"The sole question is whether under the circumstances stated in the pleadings the defendant must be taken by implied authority to have contracted with the plaintiffs to be liable individually for a portion of the debt due to them from the Copper King Company, of which he was a shareholder. I need only say that the facts fail to establish any such authority or contract. There are admittedly no facts that could establish such a contract or liability except the fact that the defendant became a shareholder in the limited company, that had an intention to trade in foreign parts, and obtained authority to do so under the memorandum of association, and traded in California. In my view the memorandum and articles of association, rightly construed, cannot be treated as an authority by every shareholder of the company, to the company, or its directors or agents, to carry on business in a foreign country so as to make the shareholder liable beyond the limited liability under which he came as a member of the company by virtue of the English law.

"If this is the correct view, and it appears to me to be clear that it is, this appeal fails. If there was no authority there was clearly no contract, and if there was no contract there is no way by virtue of which the defendant could be made liable in this country to the

plaintiffs. I need hardly point out that the shareholder and the company are different entities and that the judgment obtained abroad is a judgment against the company, which *prima facie* does not affect the shareholder. If the shareholder and the company are treated as different entities, the plaintiffs cannot, by law enforceable in this country, say that the company trading in California must, though without authority from the shareholder, nevertheless be held to have contracted so as to make him liable. There is no ground on which liability on the part of the defendant to the plaintiff can be legally based."

It has been suggested by the California Court that a stockholder is liable under the statute as upon a contract because the corporation is the agent of the stockholders for the purpose of subjecting them to the liability (*Kennedy* v. *California Savings Bank*, 97 Cal. 93 on p. 96; *McGowan* v. *McDonald*, 111 Cal. 57, 71).

It may be questioned whether the relationship between a stockholder and the corporation can properly be described as that of principal and agent or the liabilities of the stockholders be supported on principles of agency.

But even considered from this point of view it is clear that in the present case there is no basis for the plaintiff's claim to a recovery. The powers of the corporation regarded as the agent of the stockholders, and the responsibilities of the latter for the Company's acts or liabilities, are limited by the terms of the charter and by the Arizona law under which the Company was created. The charter lawfully provided that the stockholders should be exempt from liability to

creditors of the corporation and in the face of this stipulation the company or its officers had no power to subject them to any such liability. Moreover, the Court has found that the defendant agreed with the Company, its incorporators and stockholders that neither the company, its officers or agents should have power to subject the defendant or the other stockholders to any personal liability for the debts or obligations of the company (Record, pp. 29-30).

This exemption from liability and limitation upon the Company's powers was not inconsistent with the power of the company to do business in California, for it was by no means necessary that the company should contract debts in California. It might have borrowed its money elsewhere,—and perhaps on better terms. Or, if it incurred liabilities in California, the officers might have kept within their authority by stipulating with the creditors that the debts should not be enforceable against the members of the company. It was competent for the creditors to waive their right of recourse against the stockholders.

Robinson v. *Bidwell*, 22 Cal. 379, on p. 388;
French v. *Teschemaker*, 24 Cal. 518, 559-560;
Wells v. *Black*, 117 Cal. 157, 161;
United States v. *Stanford*, 161 U. S. 412.

Moreover, the power of the company and its officers to bind the defendant for the debts of the company as defined and limited in the charter and by the agreement of the parties could not as against him, a non-resident of California, be enlarged by the statutes of that state.

Pope v. *Nickerson*, 3 Story, 465, 475-476, 480.
Liverpool Steam Co. v. *Phenix Ins. Co.* 129 U. S. 397 on pp. 449-454.
King v. *Sarria*, 69 N. Y. 24, 33.
Grover & Baker Machine Co. v. *Radcliff*, 137 U. S. 287 on p. 299.

As Romer, L. J. said in the *Risdom case* (L. R. 1906, 1 K. B. 49, on pp. 58-59):

> "If there was no authority there was clearly no contract, and if there is no contract there is no way by virtue of which the defendant could be made liable in this country to the plaintiffs. I need hardly point out that the shareholder and the company are different entities and that the judgment obtained abroad is a judgment against the company which *prima facie* does not affect the shareholder. If the shareholder and the company are treated as different entities, the plaintiffs cannot by law enforceable in this country say that the company trading in California, must, though without authority from the shareholder, nevertheless be held to have contracted so as to make him liable."

In this aspect of the case it is important to notice that it has been stipulated and found by the court that at the time the loans here in question were made to the Hotel Company, the lenders

> "had full notice of the provisions of said certificates of incorporation and that under the laws pursuant to which said Wentworth Hotel Company was incorporated and by virtue of the agreement of the incorporators and stockholders thereof, said stockholders and this defendant were not subject and could not be subjected to any personal liability for

any debts or liabilities of the said corporation or to any creditors thereof". (Record, Finding VI, p. 30).

The creditors, then, knew, when their debts were contracted, that the company could not pledge the credit of the stockholders. It is as if by the terms of the charter, of which they had notice, the officers' power to borrow had been limited to loans as to which the lender by express stipulation waived any claim upon stockholders. If in such a case money were borrowed without taking such a stipulation the transaction would be as to the stockholders unauthorized and the lenders' claims unenforceable against them.

It is fundamental in the law of agency that when a third party deals with an agent with notice that he has no authority to make a contract imposing personal liability upon the principal, he is bound by the notice and the principal comes under no liability to him upon the contract.

This rule has often been applied in the case of partnerships,—in many respects closely analogous to corporations. If the partnership articles restrict the powers of a partner to act for the firm or to pledge the credit of his copartner, notice of the restriction binds the creditor (*Johnson* v. *Haws*, 47 App. Div. 597; affd. 168 N. Y. 654; *Ensign* v. *Wands*, 1 Johns. Cases 171; Story on Partnership, Sec. 130).

So in the important case of *King* v. *Sarria*, 69 N. Y. 24, it was held that a special partner in a Cuban special partnership could not be charged in New York as a general partner upon a contract made by the firm in New York; that his liability and the powers of his copartnership to

bind him were to be determined by a reference to the Cuban law. The court said with reference to the liability of the special partner Sarria (p. 29):

> "We have then Sarria himself making in person no contract with the plaintiffs and giving a special and express authority only, to Grau & Lopez to make one, which authority was in exact pursuance of law. Those who deal with one as agent do so at their peril if it turns out that he had no authority from the principal; and where they rely upon his delegated authority as that of a partner and know that the partnership was created in another country, must they not look to it to see how far that law and the partnership under it give power to the acting partner."

The case in this aspect is analogous to that of *Ward* v. *Joslyn*, 186 U. S. 142, where a contract of guaranty given by a corporation without authority was held unenforceable against the stockholders and this regardless of the question whether the company itself might be bound upon it or not. The court there said (pp. 151-152):

> "Can an obligation which a corporation had no right to incur be a contractual obligation and the basis of 'dues,' as that word is used in the State Constitution? We do not think so. It appears to us that it was not intended by that instrument to impose individual liability on stockholders in respect of risks which they had not undertaken.
>
> One of the grounds on which the doctrine of *ultra vires* rests is that the interests of the stockholders ought not to be subjected to such risks. *Rights of stockholders must be considered as well as those of creditors, and they should not be held directly liable unless such liability was within their contract in legal contemplation*" (italics ours).

See also

Boyd v. *Herron*, 125 Cal. 443, on p. 455.
Thomas v. *Wentworth Hotel Co.*, 16 Cal. App. 403, on p. 414.

The plaintiff's claim, then, clearly finds no support either in the theory that the incorporators or stockholders of the company contracted with reference to the California law, and with the intent to assume liability thereunder, or in the theory that the Hotel Company as the stockholders' agent, was entitled to pledge their credit and subject them to liability upon the Company's California indebtedness.

Nor is the plaintiff entitled to recover, if the basis of a stockholder's liability be found in the rule that regardless of any question of actual intent or authority, anyone who becomes a stockholder in the corporation, must necessarily be held to take his membership with the privileges and subject to the limitations and liabilities which the law creating the corporation and permitting him to acquire his membership confers or prescribes. For in this view obviously the law with reference to which the defendant's liability must be determined is the law of Arizona.

That this is the sound basis of the liability is recognized in *Christopher* v. *Norvell*, 201 U. S. 216. The defendant there, a married woman resident in Florida, received certain stock in a national bank by bequest, the stock being transferred to her name on the books by her father's executors. When sued upon an assessment by the Comptroller, her counsel claimed that under the law of Florida as at common law, the defendant could not bind herself personally by a con-

tract. The court nevertheless held her liable upon the assessment. The court said at p. 229:

> "All shareholders of stock in national banks become such, subject to the condition, declared by statute, that liability to the extent of their shares is imposed upon them for the contracts, debts and engagements of the bank. The statute, in effect, says to all who become owners of national bank stock, no matter in what way they become shareholders, that they cannot enjoy the benefits accruing to shareholders and escape liability for the contracts, debts and engagements of the bank. In other words, *the government that created the bank has prescribed the terms upon which ownership of its shares could be acquired* and individual liability incurred by shareholders,—executors, administrators, guardians or trustees only being exempted from individual liability. No exception is made in favor of married women holding property."

III.—The California Statute could not and did not impose upon the defendant below, a non-resident of California and not subject to its jurisdiction, any liability to the creditors of the company for debts incurred in California or elsewhere.

A stockholder's statutory liability enforceable in foreign jurisdictions always sounds in contract. If the non-resident stockholder acquire stock in a corporation organized under laws which impose such a liability, he necessarily assumes the liabil-

ity which is attached to his stock interest by the law which creates it, and may properly be held to have intended to do so.

So, in *Flash* v. *Conn.*, 109 U. S. 371, in considering the provision of the New York law subjecting a stockholder to liability until the capital stock was paid up and certificate filed, the Court said, pp. 377 *et seq.*:

> "We think the liability imposed by Section 10 is a liability arising upon contract. * * * Everyone who becomes a member of the company by subscribing to its stock assumes this liability, which continues until the capital stock is all paid up and a certificate of that fact is made, published and recorded."

See also:

Christopher v. *Norvell*, 201 U. S. 216, 229.
Richmond v. *Irons*, 121 U. S. 27, 55-56.
Whitman v. *Oxford Natl. Bank*, 176 U. S. 559, 563-64.
Bernheimer v. *Converse*, 206 U. S. 516, 529-30.
Hawthorn v. *Calef*, 2 Well. 10, 22.
Howarth v. *Lombard*, 175 Mass. 570, 573-75.
Howarth v. *Angle*, 162 N. Y. 179, 187-188.
Kennedy v. *Bank*, 97 Cal. 93.

This liability under the laws of the domicil of the corporation rests equally upon resident and non-resident stockholders, for each by his voluntary act has become a stockholder in the company and thereby subjected himself both as to his rights and liabilities as a stockholder to the law which creates the company and defines the privileges and responsibilities attaching to membership therein.

No state can by its law prescribe the terms and conditions upon which a non-resident may become a stockholder in a foreign corporation or impose liabilities upon him as such; for neither the corporation when organized nor the non-resident stockholder then or thereafter is subject to the jurisdiction of the foreign state (See Morawetz on Corporations, Sec. 874).

In *Pennoyer* v. *Neff*, 95 U. S. 714, the court referring to the principles bearing upon the authority of independent states, said at p. 722:

> "One of these principles is that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. * * * The other principle of public law referred to follows from the one mentioned; that is, that no state can exercise direct jurisdiction and authority over persons or property without its territory."

And see:

Huntington v. *Attrill*, 146 U. S. 657, on p. 669.
Freeman v. *Anderson*, 119 U. S. 185, 188.
Buchanan v. *Rucker*, 9 East. 192.
Story on Conflict of Laws, 8th edition, Sec. 7, Sec. 20.
Cooley's Constitutional Limitations, 7th edition p. 176.

Upon similar grounds a state cannot enlarge the authority of an agent for a non-resident principal beyond that actually conferred.

Pope v. *Nickerson*, 3 Story, 465, 475-476, 480.
King v. *Sarria*, 69 N. Y., 24, 33.

Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397, 454.
Grover & Baker Machine Co. v. *Radcliffe*, 137 U. S., 287, 299.
Cf. Leyner Engineering Works v. *Kempner*, 163 Fed., 605.

The defendant at the time of the transactions in question was and still is a non-resident of California. It does not appear that he has ever been in California or has ever been subject to its jurisdiction or laws.

The fact that the Wentworth Hotel Company owned property and did business and contracted debts in California is immaterial. The defendant was not and is not the Wentworth Hotel Company. That Company is a distinct legal entity, having its own property, its own rights and powers, and subject to its own liabilities. When the Company bought the property Mr. Matthiessen took no title to it, and when it did business it acted in its own behalf and its acts did not bring the defendant within the jurisdiction or subject him to the laws of the State. This is clear upon the authorities.

In *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406, the court affirmed a Master's report in which it was held that a foreign corporation owning all the capital stock of a New York corporation was not doing business in the State of New York or subject to process therein. The report confirmed, as quoted at page 409, said:

> "The fact that it held the entire capital stock of the Castner Electrolitic Alkali Company and that the operations of that company were carried on under the same management as before December 31st, 1900, is not mater-

ial. The new corporation was a separate legal entity and whatever may have been the motives leading to its creation it can only be regarded as such for the purposes of legal proceedings."

So in *People* v. *American Bell Telephone Co.*, 117 N. Y. 241, the court held that a foreign corporation owning stock in a local company was not doing business within the State or subject to taxation by reason of its stock ownership. The court said (p. 255):

> "In no legal sense can the business of a corporation be said to be that of its individual stockholders. It is true that they have an interest in the business carried on and an influence in controlling its conduct; but they have created a legal entity to prosecute such business, make its contracts and be responsible for its obligations, and that entity is alone responsible to persons dealing with it for the conduct of such business."

See also:

Peterson v. *Chicago, R. I. & Pac. R'way Co.*, 205 U. S. 364, 391 *et seq.*

Risdon, etc., Works v. *Furness, L. R.* 1906, 1 K. B. 49, 59.

United States v. *American Bell Telephone Co.*, 29 Fed. Rep. 17.

Richmond & I. Const. Co. v. *Richmond, etc. R. R. Co.*, 68 Fed. Rep 105, 108.

Of course when the Wentworth Hotel Company did business in California the *Company* in the conduct of that business was subject to the California law. California could limit the exercise of its

powers and impose upon the conduct of its business the same conditions which were in force with reference to domestic corporations.

This was all that the constitutional provision in California did or purported to do. Its provision that no foreign corporation should "be allowed to transact business within this state on more favorable conditions than are prescribed to similar corporations organized under the laws of this state", applied only to the corporation. Properly construed it did not extend or purport to extend to the stockholders of the corporation.

> *National Park Bank* v. *Remsen*, 158 U. S. 337, 344-346.
> *Young* v. *Moore*, 162 Mich. 60.
> *Williams* v. *Gaylord*, 186 U. S. 157, 165.
> *Miles* v. *Woodward*, 115 Cal. 308, 311.
> *London etc Bank & Aronstin*, 117 Fed. 601, 609.

The California statute alone purported to reach the stockholders in foreign corporations and to charge them with liability like that of stockholders in domestic corporations, *i. e.*, a proportionate liability to all creditors of the corporation. This could perhaps be done as to domestic stockholders resident in and subject to the jurisdiction of the state. But it was beyond the power of the legislature by any such enactment to subject non-resident stockholders over whom the state had no jurisdiction to a liability which they had not assumed.

The adoption of the contrary rule would obviously lead to startling results. In *Leyner Engineering Works* v. *Kempner*, 163 Fed. Rep. 605, it was sought to charge a Texas stockholder in a Texas corporation, which had done business in

Colorado without filing a copy of its articles of incorporation, with liability for the company's debts under the Colorado statute. In refusing to recognize this liability the court said (p. 608):

> "What law fixes the liability of stockholders; that is, does the statute law of the state of incorporation fix and determine the liability of the shareholder, or is the liability to be determined and the stockholder charged by the enactments of every State in the Union in which the corporation may transact business; if the latter were true, it would invite immediate dissolution, for no sane person would become a purchaser of stock with the legal assurance that in the event the corporation did business in a sister State—Colorado, for instance—and loss and disaster attended the venture, and it should develop that a failure to comply with some statutory provision in regard to filing a copy of its articles of incorporation, a stockholder of Vermont having subscribed and paid for a single share of the value of one hundred dollars, would be called upon to make good the loss of every creditor who elected to extend a line of credit to the insolvent corporation. * * * The doctrine is monstrous and finds no support in the decisions of any court, State or Federal, and is hostile to the declared and recognized policy of this State."

That the California statute can have no greater effect than we have stated, is not, as we understand it, disputed by petitioner's counsel. Their position is that the defendant's liability is one which "rests upon a simple contract" (Petitioner's brief, p. 30), and that either all of the stockholders resident and non-resident "made this alleged contract or else none of them did" (Petitioner's brief p. 28).

The existence of any such contractual obligations has not been found. And, as we have seen, upon the present record and under established principles of law no such contractual obligation can be found.

Statutes imposing liability upon stockholders are in derogation of the common law and are to be strictly construed (*Brunswick Terminal Co.* v. *The Bank*, 192 U. S. 386 on p. 390; *Davidson* v. *Rankin*, 34 Cal. 503).

The statute here in question may have been intended to refer to all stockholders in foreign corporations doing business in California whether residents of that state or not, or it may have been intended to apply only to residents who should become such stockholders. Construed in the first and broader sense the statute was in excess of the legislative power of the state so far as it related to non-resident stockholders in foreign corporations. Construed more strictly as applicable to the state's own citizens it can be given effect as it has been by the California courts; for California could doubtless restrict the right of its citizens to become members of corporations foreign or domestic and impose upon those who did such liabilities as it saw fit. It would seem that the latter and more limited construction is alone permissible (*Buchanan* v. *Rucker*, 9 East 192, 194).

But however it be construed it is clearly ineffective as against the defendant below.

IV.—The notes here in question having been payable at the banking houses of the First National Bank and Union Savings Bank respectively, the plaintiff's assignors, those banks were bound to apply to their payment at maturity the deposits then or thereafter on hand and applicable thereto. Having failed to do so the plaintiff is not entitled to charge the defendant for the resulting loss.

The note held by the First National Bank was for $22,500, dated October 5, 1906, payable thirty days thereafter to the order of that bank "at its banking house in the City of Pasadena" (Record p. 31). When the note matured the First National Bank had no other claim against the Hotel Company and held on deposit to the credit of that Company upwards of $28,000 (Finding XIV, Record pp. 33-33).

The note of the Union Savings Bank was for $25,000, dated November 16, 1906, payable one day after date to the order of the bank at "its banking house in Pasadena" (Record p. 32). When this note matured it was the only debt due from the Hotel Company to that bank and the bank held on deposit to the credit of the Hotel Company $10,545.09, the deposit being subsequently increased to a total of $24,954.89 on January 17th, 1907 (Record, Finding XV, pp. 33, 34).

The provision in the notes making them payable at the banks respectively amounted to a

request by the Wentworth Hotel Company to the Banks to pay the same out of any of its general funds they might hold on deopsit. The notes were in effect checks or orders upon the accounts.

Aetna Natl. Bank v. *Fourth Natl. Bank*, 46 N. Y. 82 on p. 88.
Indig v. *National City Bank*, 80 N. Y. 100, on p. 106.
5 Cyc. 555.

The banks had the right, and we submit were as to this defendant under the obligation, to follow this direction of the maker of the notes and to see that the notes were paid at or after maturity from the Company's money they held. (See 2 Morse on Banks and Banking, 4th Ed. §§557-563, pp. 949-956; 5 Cyc. on p. 554).

The possession by a bank at which a note it holds is made payable of sufficient funds of the maker to pay it at maturity it seems should be deemed to amount to payment (cf. *Fullerton* v. *The Bank of the United States*, 1 Peters 604, on p. 617; *Bank of United States v. Carneal*, 2 Peters 543, on p. 548).

Certainly this should, we submit, be the rule in favor of an endorser, surety or guarantor of the note, and such has frequently been held to be the law.

Pursifull v. *Pineville Banking Co.*, 97 Ky. 154.
Commercial National Bank v. *Henninger*, 105 Pa. 496.
German National Bank v. *Foreman*, 138 Pa. 474.
Bank v. *Petty*, 176 Pa. 513.
Dawson v. *The Bank*, 5 Ark. 283.
McDowell v. *The Bank*, 1 Harr. (Del.) 369.

The plaintiff argues that this principle is not applicable here because under the California law a stockholder is primarily liable to the creditors (Petitioner's brief, pp. 32-34).

Of course the liability is primary in the sense that the stockholder can be sued in the first instance even though no effort has been made to enforce the claim against the company, but this does not mean that a stockholder in a solvent company who has been sued by a creditor and compelled to pay his proportion of the debt is not, as against the Company and his fellow stockholders entitled to be reimbursed from its assets. His equitable right to such reimbursement is clear and is recognized by the California courts.

> *Re California Mutual Life Ins. Co.* 81 Cal. 364 on pp. 365-368.
> cf. *Prince* v. *Lynch,* 38 Cal. 528, 538.

In the *California Insurance Co. case, supra,* it is true that the stockholder was held not entitled to reimbursement from a special guarantee fund which under the California law had been deposited, the fund consisting of the notes of individuals who in effect were guarantors for the Company. But the opinion clearly shows, and the Court adjudged, that, as against the assets of the corporation itself before these were distributed pro rata among stockholders the stockholder who had been required to pay a portion of a debt of the company was entitled to be reimbursed.

Such being the case, we submit that the stockholder has some rights, analogous to those of endorsers and sureties which the creditor is bound to respect and that to the extent that the banks

were in funds when the notes matured they should be deemed paid, or that the banks' neglect to secure payment should, to the extent to which they might have done so from the deposits, bar a recovery against the stockholders.

Counsel argue that a bank holding a note does not discharge a surety by failing to apply money of the maker it holds on deposit at or after the time the note matures. If, however, the note by its terms is payable at the bank which holds it the better authorities are to the contrary. (See *Pursifull* v. *Pineville Banking Co.* and other cases cited *supra*). And the authorities counsel rely upon (Petitioner's brief pp. 35-36) are distinguishable upon this or other grounds.

Thus in *Bank* v. *Peck*, 127 Mass. 298, the note under consideration was given by the treasurer of the Town and was regarded as a Town obligation, while the deposit was to the credit of the individual. In *Strong* v. *Foster*, 17 C. B. 201, *Bank* v. *Smith*, 66 N. Y. 271, *Citizens Bank* v. *Booze*, 75 Mo. App. 189, *Bank of British Columbia* v. *Jeffs*, 15 Wash. 230, *Voss* v. *German American Bank*, 83 Ill. 599, *Citizens Bank* v. *Elliott*, 9 Kan. App. 797, and *Martin* v. *Mechanics Bank*, 6 Har. & J. (Md.) 235 the notes were not or did not appear to have been made payable at the Bank. In *Huston* v. *Braden*, 37 S. W. Rep. 467, no deposit was made until after the maturity of the note, and in *Glazier* v. *Douglas*, 32 Conn. 393, and *McShane* v. *Howard Bank*, 73 Md. 135, there was no question of bank deposits at all.

VI.—The judgment below should be affirmed with costs.

Respectfully submitted,

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THOMAS *v.* MATTHIESSEN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 171. Argued January 19, 1914.—Decided February 2, 1914.

While a corporation cannot, without authority from the stockholders, make them answerable in a way not contemplated by the charter, a provision in the charter of a corporation organized in one State authorizing it to do business in another State may subject the stock-

holders to the liability imposed in the latter State, notwithstanding there are other provisions in the charter exempting stockholders from liability for debts of the corporation.

Stockholders of a corporation organized in one State under a charter expressly authorizing it to do business in another State create the corporation their agent for the making of contracts within the latter State in accordance with its laws.

Stockholders of a corporation organized in Arizona under a charter which expressly authorized the corporation to do business in California *held*, in this case, subject to the liability imposed by § 322, Civil Code of the latter State.

Under the laws of California a stockholder is liable for his proportion of the debts of the corporation as a principal and not as a surety; nor in this case was he relieved of liability on notes held by a bank which had deposits to the credit of the corporation and did not apply the same to payment of the notes.

192 Fed. Rep. 495, reversed.

THE facts, which involve the liability under the laws of California of a stockholder of a corporation organized in Arizona for the purpose of carrying on business in California, are stated in the opinion.

Mr. Alfred Adams Wheat, with whom *Mr. Philip Ashton Rollins* was on the brief, for petitioner:

This case is controlled by *Pinney* v. *Nelson*, 183 U. S. 144, the doctrine enunciated in which has been accepted by the courts of California and has been approved by *State* v. *New Orleans Warehouse Co.*, 109 Louisiana, 72. See also *Peck* v. *Noee*, 154 California, 341.

In *Thomas* v. *Wentworth Hotel Co.*, 158 California, 275, the court met every point that could be used to distinguish this case from *Pinney* v. *Nelson*, except the facts that defendant is not a resident of California, and that there is a finding of fact that it was the purpose and intent of subscribers that their obligations as such and as stockholders should be controlled and determined by the articles of incorporation of said company and by the laws of Arizona. Neither of these findings supplies a sound rea-

son for varying the rule and therefore defendant is liable under the law of California.

The fact that the articles of incorporation contain a declaration, as authorized by the Arizona law, that the stockholders shall not be personally liable for the debts of the corporation, does not distinguish this case from *Pinney* v. *Nelson*. See 26 Am. & Eng. Enc. (2d ed.), 1017; *Terry* v. *Little*, 101 U. S. 216; *Citizens Savings Bank* v. *Owensboro*, 173 U. S. 636, 644; *Knights of Pythias* v. *Weller*, 93 Virginia, 605, 613; *Danville* v. *Water Co.*, 178 Illinois, 299, 306.

The finding that it was the purpose and intent of the stockholders that their obligations should be controlled by the articles of incorporation and by the laws of Arizona, does not distinguish this case from *Pinney* v. *Nelson*. *Risdon Iron Works* v. *Furness*, L. R. (1906) 1 K. B. 49, does not apply. See Keener on Quasi-Contracts, p. 5.

The fact that defendant is not a resident of California does not distinguish this case from *Pinney* v. *Nelson*.

As defendant contracted to assume the liabilities imposed by the California law for debts incurred by the corporation in that State the place of his residence is not material.

The stockholders' liability imposed by the law of California is contractual in nature. *Kennedy* v. *California Bank*, 97 California, 93; *Flash* v. *Conn*, 109 U. S. 371; *Whitman* v. *Oxford Bank*, 176 U. S. 559; 26 Am. & Eng. Enc. (2d ed.), 1020.

Plaintiff pursued the proper remedy in a court of adequate jurisdiction.

The United States courts have jurisdiction to enforce such a liability outside of the State where it was created. *Bernheimer* v. *Converse*, 206 U. S. 516, 529; *Whitman* v. *Oxford Bank*, 176 U. S. 558, 563; *Flash* v. *Conn*, 109 U. S. 371; Cook on Corp., § 223, n. 2; *Ferguson* v. *Sherman*, 116 California, 169, 173.

The California statute provides no peculiar remedy and therefore the general liability created thereby may be enforced by a common-law action in the Federal court. *Mills* v. *Scott*, 99 U. S. 25; *National Park Bank* v. *Peary*, 64 Fed. Rep. 912; *Aldrich* v. *Anchor Coal Co.*, 24 Oregon, 32.

The liability of a stockholder under the California law is not that of a surety but is primary, absolute, unconditional, and in no wise contingent, and it is distinct from that of the corporation. A suspension or bar of the remedy against the corporation does not suspend or bar it against the stockholder. It is not affected by any security given to or held by the creditor or by any lien acquired by him through judgment, attachment or otherwise. It is not released or diminished by any extension of time given to the corporation, and if the stockholder discharges his liability to a creditor he can recover no portion of the same back, either by subrogation or otherwise. *Mokelumne Hill Co.* v. *Woodburn*, 14 California, 265; *Davidson* v. *Rankin*, 34 California, 503; *Young* v. *Rosenbaum*, 39 California, 646; *Sonoma Valley Bank* v. *Hill*, 59 California, 107; *Faymonville* v. *McCullough*, 59 California, 285; *Mitchell* v. *Beekman*, 64 California, 383; *In re California Ins. Co.*, 81 California, 364; *Hyman* v. *Coleman*, 82 California, 650; *Knowles* v. *Sandercock*, 107 California, 629; *Herman* v. *Hecht*, 116 California, 553; *Sacramento Bank* v. *Pacific Bank*, 124 California, 147; *Morrow* v. *Superior Court*, 64 California, 383; *Neilson* v. *Crawford*, 52 California, 248.

Even though the personal liability of a stockholder under the California law were merely that of a surety the facts alleged in the supplemental answer would not constitute a defense.

A bank, the payee or holder of a note, does not discharge a surety by failing to apply money of the maker which happens to be on deposit at or after the time the note matures. *Strong* v. *Foster*, 17 C. B. 217; *Citizens Bank* v. *Elliott*, 9 Kans. App. 797; *Martin* v. *Mechanics*

Bank, 6 Har. & J. (Md.) 235; *McShane* v. *Howard Bank*, 73 Maryland, 135; *Citizens Bank* v. *Booze*, 75 Mo. App. 189; *Houston* v. *Braden*, 37 S. W. Rep. 467; *Bank of British Columbia* v. *Jeffs*, 15 Washington, 230; *National Bank* v. *Peck*, 127 Massachusetts, 301; *Voss* v. *German-Am. Bank*, 83 Illinois, 599; *National Bank* v. *Smith*, 66 N. Y, 271; *Glazier* v. *Douglass*, 32 Connecticut, 383.

Plaintiff's failure to prosecute diligently his action against the corporation did not release defendant, even though his liability was merely that of a surety. *Lowman* v. *Yates*, 37 N. Y. 601; *Douglass* v. *Ferris*, 138 N. Y. 192; *McKin* v. *Williams*, 134 Massachusetts, 13; *Greenway* v. *Orthwein Grain Co.*, 85 Fed. Rep. 536; *Hunt* v. *Purdy*, 82 N. Y. 486; *Jones* v. *Allen*, 85 Fed. Rep. 523; *Biggins* v. *Raisch*, 107 California, 210; *Monroe County* v. *Otis*, 62 N. Y. 88; *Clark* v. *Sickler*, 64 N. Y. 231.

The judgment should be reversed, and, as all the material facts have been stipulated and the damages recoverable are liquidated, no new trial should be awarded and the court below should be directed to render the proper judgment against defendant. *Rathbone* v. *Board of Commissioners*, 83 Fed. Rep. 125; *Irvine* v. *Angus*, 93 Fed. Rep. 629; *Churchill* v. *Buck*, 102 Fed. Rep. 38; *Ft. Scott* v. *Hickman*, 112 U. S. 150; *Allen* v. *St. Louis Bank*, 120 U. S. 20; *Saltonstall* v. *Russell*, 152 U. S. 628.

Under the California law the stockholder is liable for his *pro rata* share of interest as well as principal. *Wells, Fargo & Co.* v. *Enright*, 127 California, 669.

Mr. Arthur C. Rounds, with whom *Mr. Harold Otis* was on the brief, for respondent:

Pinney v. *Nelson*, 183 U. S. 144, does not establish the right of the petitioner to a recovery. In that case the only question decided by the California court was the constitutionality of § 322 of the Civil Code of California. That was the sole question presented for determination.

The decision in that case that when a corporation is formed in one State and "by the express terms of its charter it is created for doing business in another State and business is done in that State it must be assumed that the charter contract was made with reference to" the laws of the latter State, was expressly based upon the special and peculiar provision of the charter there under consideration, that the company was "created for doing business" in the other State. The court did not hold that if it clearly appeared upon a fair construction of the charter that the parties in fact contracted with a view to the laws of the incorporating State, the court must nevertheless assume the contrary in order to impose upon the stockholders a liability which they never agreed to assume and from which they were exempt by the laws of the incorporating State and by the company's express charter provisions. *Risdon Iron Works* v. *Furness*, L. R. (1905) 1 K. B. 304, *S. C.*, L. R. (1906) 1 K. B. 49; *Thomas* v. *Matthiessen*, 192 Fed. Rep. 495.

In this case the charter provided that the capital stock should be non-assessable, and that the private property of the stockholders in the company should be forever "exempt from all liability for its debts and obligations."

The trial below having been by the court without a jury, the court's findings of fact are not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties. *Norris* v. *Jackson*, 9 Wall. 125. And see *Miller* v. *Life Ins. Co.*, 12 Wall. 285; *Raimond* v. *Terre Bonne*, 132 U. S. 192; *Collins* v. *Riley*, 104 U. S. 322.

The law cannot read into the contract of the incorporators and stockholders an agreement to assume a liability under the California statute which is inconsistent with their actual intent and with the express stipulations of the charter. *Grover & Baker* v. *Radcliffe*, 137 U. S. 287.

Nor is the obligation *quasi*-contractual. *Buchanan* v. *Rucker*, 9 East, 192; *Pennoyer* v. *Neff*, 95 U. S. 714, 722,

Huntington v. *Attrill*, 146 U. S. 657, 669; *Freeman* v. *Alderson*, 119 U. S. 185, 188.

The right of a corporation to exist rests upon and is derived from the laws of the incorporating State and its powers are conferred upon it by those laws subject to such restrictions and limitations as they may prescribe. *Canada Southern R. R. Co.* v. *Gebhard*, 109 U. S. 527, 537; *Nashua Savings Bank* v. *Anglo-American Co.*, 189 U. S. 221, 320; *Christopher* v. *Norvell*, 201 U. S. 216, 228.

No court outside of California has ever considered that the *Pinney Case* declared or was authority for any such rule of liability as petitioner contends. *Coulter Dry Goods Co.* v. *Rosenbaum*, 74 Misc. (N. Y.) 579. For other cases involving the existence or enforceability of liability of stockholders of this corporation, see *Thomas* v. *Wentworth Hotel Co.*, 158 California, 275; *S. C.*, 16 Cal. App. 403; *Peck* v. *Noee*, 154 California, 351. *State* v. *New Orleans Warehouse Co.*, 109 Louisiana, 72, distinguished.

If, under any such rule of liability as plaintiff contends for, innocent stockholders are chargeable not merely with the liabilities imposed by the law of the domicil of the corporation, but as well with the varying liabilities prescribed by the laws of the various States where the corporation under its charter powers, may engage in business, corporate stock is liable to become in this country an uncertain and even dangerous asset. *Thomas* v. *Matthiessen*, 192 Fed. Rep. 495, 498; *Leyner Engineering Works* v. *Kempner*, 163 Fed. Rep. 605, 608.

Defendant when he subscribed for his stock contracted with reference to the laws of Arizona. He did not agree to assume any liabilities under the California law. And the debts, which the hotel company subsequently contracted in California, were not binding upon or enforceable against him as contractual obligations.

The mere fact that the articles provided that the principal place of the company outside of Arizona should be in

California is not sufficient to overcome the inference as to the intent of the incorporators to contract with reference to the laws of Arizona.

While the laws of a foreign State in which the company may attempt to do business may prevent the doing of business or limit the exercise of the corporate powers, *Relfe* v. *Rundle*, 103 U. S. 222, 226, such laws cannot enlarge the powers of the corporation or provide for the conduct of its business in a way which is not permitted by the law of its incorporation. Nor can such laws affect the position of the stockholders in the company by enlarging, limiting or modifying their rights as members of the corporation or by altering their liabilities to its creditors as fixed by the law under and subject to which they became stockholders. *Railway Co.* v. *Allerton*, 18 Wall. 233, 235; *Christopher* v. *Norvell*, 201 U. S. 216, 226; *Miles* v. *Woodward*, 115 California, 308, 311; Morawetz on Corporations, § 874; *Nashua Savings Bank* v. *Anglo-American Co.*, 189 U. S. 221, 230; *Canada Southern R. R. Co.* v. *Gebhard*, 109 U. S. 527, 537. See also, *Glenn* v. *Liggett*, 135 U. S. 533, 548; *Hawkins* v. *Glenn*, 131 U. S. 319, 322; *Relfe* v. *Rundle*, 103 U. S. 222, 226; *Converse* v. *Hamilton*, 224 U. S. 243, 253; *O'Connor* v. *Witherby*, 111 California, 523, 527; *Merrick* v. *Van Santvoord*, 34 N. Y. 208, 216; *Converse* v. *Aetna Bank*, 79 Connecticut, 163, 169; *Risdon Locomotive Works* v. *Furness*, L. R. 1906, 1 K. B. 49; *S. C.*, L. R. 1905, 1 K. B. 304; *Leyner Engineering Works* v. *Kempner*, 163 Fed. Rep. 605.

The suggestion that a stockholder is liable under the statute as upon a contract because the corporation is the agent of the stockholders for the purpose of subjecting them to the liability, *Kennedy* v. *California Savings Bank*, 97 California, 93, 96; *McGowan* v. *McDonald*, 111 California, 57, 71, cannot be sustained, as the relationship between a stockholder and the corporation cannot prop-

erly be described as that of principal and agent or the liabilities of the stockholders be supported on principles of agency.

The court has found that the defendant agreed with the company, its incorporators and stockholders, that neither the company, its officers or agents should have power to subject the defendant or the other stockholders to any personal liability for the debts or obligations of the company.

It was competent for the creditors to waive their right of recourse against the stockholders. *Robinson* v. *Bidwell*, 22 California, 379, 388; *French* v. *Teschemaker*, 24 California, 518, 559–560; *Wells* v. *Black*, 117 California, 157, 161; *United States* v. *Stanford*, 161 U. S. 412.

The power of the company and its officers to bind the defendant for the debts of the company as defined and limited in the charter and by the agreement of the parties could not as against him, a non-resident of California, be enlarged by the statutes of that State. *Pope* v. *Nickerson*, 3 Story, 465, 475, 480; *Liverpool Steam Co.* v. *Phoenix Ins. Co.*, 129 U. S. 397, 449; *King* v. *Sarria*, 69 N. Y. 24, 33; *Grover & Baker Co.* v. *Radcliffe*, 137 U. S. 287, 299.

If the partnership articles restrict the powers of a partner to act for the firm or pledge the credit of his copartner, notice of the restriction binds the creditor. *Johnson* v. *Haws*, 47 App. Div. 597; aff'd, 168 N. Y. 654; *Ensign* v. *Wands*, 1 Johns. Cases, 171; Story on Partnership, § 130; *King* v. *Sarria*, 69 N. Y. 24; *Ward* v. *Joslyn*, 186 U. S. 142, 151. See also *Boyd* v. *Herron*, 125 California, 443, 455; *Thomas* v. *Wentworth Hotel Co.*, 16 Cal. App. 403, 414.

The California statute could not and did not impose upon the defendant below, a non-resident of California and not subject to its jurisdiction, any liability to the creditors of the company for debts incurred in California or elsewhere. *Flash* v. *Conn*, 109 U. S. 371, 377; *Christopher*

v. *Norvell*, 201 U. S. 216, 229; *Richmond* v. *Irons*, 121 U. S. 27, 55; *Whitman* v. *Oxford Natl. Bank*, 176 U. S. 559, 563; *Bernheimer* v. *Converse*, 206 U. S. 516, 529; *Hawthorne* v. *Calef*, 2 Wall. 10, 22; *Howarth* v. *Lombard*, 175 Massachusetts, 570, 573; *Howarth* v. *Angle*, 162 N. Y. 179, 187; *Kennedy* v. *Bank*, 97 California, 93.

No State can by its law prescribe the terms and conditions upon which a non-resident may become a stockholder in a foreign corporation or impose liabilities upon him as such. Morawetz on Corporations, § 874; *Pennoyer* v. *Neff*, 95 U. S. 714. And see *Huntington* v. *Attrill*, 146 U. S. 657, 669; *Freeman* v. *Anderson*, 119 U. S. 185, 188; *Buchanan* v. *Rucker*, 9 East, 192; Story on Conflict of Laws, 8th ed., §§ 7, 20; Cooley's Const. Lim., 7th ed., p. 176.

A State cannot enlarge the authority of an agent for a non-resident principal beyond that actually conferred. *Pope* v. *Nickerson*, 3 Story, 465, 475; *King* v. *Sarria*, 69 N. Y. 24, 33; *Liverpool Steam Co.* v. *Phoenix Ins. Co.*, 129 U. S. 397, 454; *Grover & Baker Co.* v. *Radcliffe*, 137 U. S. 287, 299; *Leyner Engineering Works* v. *Kempner*, 163 Fed. Rep. 605.

The defendant at the time of the transactions in question was and still is a non-resident of California. It does not appear that he has ever been in California or has ever been subject to its jurisdiction or laws.

The company is a distinct legal entity, having its own property, its own rights and powers, and subject to its own liabilities. *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406; *People* v. *American Bell Telephone Co.*, 117 N. Y. 241, 255. See also *Peterson* v. *Chicago &c. Ry. Co.*, 205 U. S. 364, 391; *Risdon &c. Works* v. *Furness*, L. R. 1906, 1 K. B. 49, 59; *United States* v. *American Bell Telephone Co.*, 29 Fed. Rep. 17; *Richmond Const. Co.* v. *Richmond R. R. Co.*, 68 Fed. Rep. 105, 108.

Section 322 of the Civil Code, properly construed, did

not extend or purport to extend to the stockholders of the corporation. *National Park Bank* v. *Remsen*, 158 U. S. 337, 344; *Young* v. *Moore*, 162 Michigan, 60; *Williams* v. *Gaylord*, 186 U. S. 157, 165; *Miles* v. *Woodward*, 115 California, 308, 311; *London Bank* v. *Aronstin*, 117 Fed. Rep. 601, 609.

Statutes imposing liability upon stockholders are in derogation of the common law and are to be strictly construed. *Brunswick Terminal Co.* v. *The Bank*, 192 U. S. 386, 390; *Davidson* v. *Rankin*, 34 California, 503; *Buchanan* v. *Rucker*, 9 East, 192, 194.

The notes here in question having been payable at the banking houses of the First National Bank and Union Savings Bank, respectively, the plaintiff's assignors, those banks were bound to apply to their payment at maturity the deposits then or thereafter on hand and applicable thereto. Having failed to do so the plaintiff is not entitled to charge the defendant for the resulting loss. *Aetna Natl. Bank* v. *Fourth Natl. Bank*, 46 N. Y. 82, 88; *Indig* v. *National City Bank*, 80 N. Y. 100, 106; 5 Cyc. 555. See 2 Morse on Banks, 4th ed., §§ 557–563, pp. 949–956; 5 Cyc. 554; *Fullerton* v. *Bank of United States*, 1 Pet. 604, 617; *Bank of United States* v. *Carneal*, 2 Pet. 543, 548.

This should be the rule in favor of an endorser, surety or guarantor of the note. *Pursifull* v. *Pineville Banking Co.*, 97 Kentucky, 154; *Commercial Bank* v. *Henninger*, 105 Pa. St. 496; *German Bank* v. *Foreman*, 138 Pa. St. 474; *Bank* v. *Petty*, 176 Pa. St. 513; *Dawson* v. *The Bank*, 5 Arkansas, 283; *McDowell* v. *The Bank*, 1 Harr. (Del.) 369.

While the liability may be primary in the sense that the stockholder can be sued in the first instance even though no effort has been made to enforce the claim against the company, a stockholder in a solvent company who has been sued by a creditor and compelled to pay his proportion of the debt, as against the company and his fellow

stockholders is entitled to be reimbursed from its assets. *Re California Mutual Life Ins. Co.*, 81 California, 364, 365; *Prince* v. *Lynch*, 38 California, 528, 538.

A bank holding a note due at its office discharges a surety by failing to apply money of the maker it holds on deposit at or after the time the note matures.

In *Bank* v. *Peck*, 127 Massachusetts, 298; *Strong* v. *Foster*, 17 C. B. 201; *Bank* v. *Smith*, 66 N. Y. 271; *Citizens Bank* v. *Booze*, 75 Mo. App. 189; *Bank of British Columbia* v. *Jeffs*, 15 Washington, 230; *Voss* v. *German-American Bank*, 83 Illinois, 599; *Citizens Bank* v. *Elliott*, 9 Kan. App. 797, and *Martin* v. *Mechanics Bank*, 6 Har. & J. (Md.) 235, the notes were not or did not appear to have been made payable at the bank. *Huston* v. *Braden*, 37 S. W. Rep. 467; *Glazier* v. *Douglas*, 32 Connecticut, 393; *McShane* v. *Howard Bank*, 73 Maryland, 135, are also distinguishable.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit by a citizen of California, the holder of two notes made in California by the Wentworth Hotel Company, to recover from a stockholder in that corporation, a citizen of New York, a proportionate share of the sums due upon the same. The facts as agreed and found are as follows. The corporation was formed under the laws of the Territory of Arizona, among many other things, to buy and sell real estate, 'to build, maintain, operate and carry on, in all its branches, the business of hotel keeping' and to build or purchase gas or electric works in Arizona or California, 'both for its own use in the hotel business and for the purpose of selling and disposing of the same.' The principal place of business in Arizona was Tucson, and that outside of it was Los Angeles, California, with power to change to Pasadena, in that State. Before the incorporation, the defendant, re-

siding in New York, signed a writing reciting the intent of the subscribers to form a corporation in Arizona for the purpose of acquiring a portion of the Oak Knoll, and building a first class hotel thereon; and he thereby subscribed for a certain number of shares. Later he took and paid for one thousand shares. The Oak Knoll is near Pasadena in California, and the defendant and his associates intended the corporation to have the power to build and manage a hotel in that neighborhood and expected that it would do so, but intended their liability to be controlled by the laws of Arizona.

The corporation complied with the laws of California, bought the land, built the hotel, went into business, and finally was adjudged insolvent. The notes in question were given for loans to the Company. At the time of subscribing the defendant agreed with the Company that he should be exempt from personal liability and that neither the corporation nor its officers should have power to subject him or the other stockholders to it. Such exemption was expressed also in the certificate of incorporation. But by the statutes of California each stockholder of a corporation is personally liable for such proportion of the debts contracted while he is such, as the amount of his stock bears to the whole subscribed, and the liability of each stockholder of a corporation formed under the laws of any other State or Territory of the United States but doing business in California is the same. Civil Code, § 322. The courts below ruled that the defendant could not be held, the Circuit Court of Appeals citing *Risdon Iron & Locomotive Works* v. *Furness* (1906), 1 K. B. 49, in which it was held that the law of California could not impose liability upon an English shareholder in an English corporation without his assent. 192 Fed. Rep. 495, 113 C. C. A. 101.

We agree that without authority from the stockholder a corporation cannot make him answerable in a way not

contemplated by the charter. We will assume for purposes of decision, although we express no opinion upon the point, that a provision for doing business in other States without any express reference to the possible difference in their laws would not be enough to change the rule. But a provision exempting the stockholder alongside of one authorizing the doing of business elsewhere cannot be taken to limit the latter authority to those States that grant a like exemption or be deemed an attempt to override the law of the place where the business is to be done. That law may fail to operate for want of power over the person sought to be affected, but the charter leaves it open to that person to come in under it by assent. If the law of California forbade a foreign corporation to do business there unless all the stockholders filed a written assent to its conditions, the Arizona charter would not make such an agreement void. If this be true then a particular stockholder may give such assent outside of the instrument of incorporation and be bound by it.

In this case the defendant expressed in writing his wish that the corporation should set up a hotel in California. It is true that he also desired and stipulated that he should be free from personal charge. But that is merely the not infrequent occurrence of a party bringing about the facts and attempting to prohibit their legal consequence to which we lately had occasion to advert in *National City Bank* v. *Hotchkiss*, 231 U. S. 50, 56. See also *Butler* v. *Farnsworth*, 4 Wash. C. C. 101, 103, 104. This of course he cannot do. In such cases the only question is which of two inconsistent orders is the dominant command. Here the usual prevalence of the specific over the general is fortified by the consideration that the building and carrying on of the California hotel was the main object for which the parties came together. When the defendant authorized that, he could not avoid the consequences by saying that he did not foresee or intend, or that he forbade

them. He knew that California had laws and he took his risk of what they might be, when, as we must hold, he gave his assent to doing business there. We cannot interpret his words as giving merely a conditional assent. We follow the language of *Pinney* v. *Nelson*, 183 U. S. 144, so far as it sanctions the views that we have expressed. See also *Thomas* v. *Wentworth Hotel Co.*, 158 California, 275, 280.

There remains only the question whether the liability is of a kind that will be enforced outside of the California courts. Analysis on this point often is blurred by the vague statement that the liability is 'contractual.' An obligation to pay money generally is enforced by an action of assumpsit and to that extent is referred to a contract even though it be one existing only by fiction of law. But such obligations when imposed upon the members of a corporation may vary very largely. The incorporation may create a chartered partnership the members of which are primary contractors, or it may go no farther than to impose a penalty; or again it may create a secondary remedy for a debt treated as that of the corporation alone, like the right to attach the corporation's real estate; or the liability may be inseparable from the local procedure, or the law may be so ambiguous as to leave it doubtful whether the liability is matter of remedy and local or creates a contract on the part of the members that will go with them wherever they are found. *McClaine* v. *Rankin*, 197 U. S. 154, 161. *Christopher* v. *Norvell*, 201 U. S. 216, 225, 226. In the present case we think that there can be no doubt of the meaning of the California statute. It reads 'Each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities' &c., as we have stated, and supposes the action against him to be brought 'upon such debt.' Civil Code § 322. This means that by force of the statute, if the corporation incurs a debt within the juris-

diction, the stockholder is a party to it and joins in the contract in the proportion of his shares. And while the statutes of California cannot force an agent upon a foreign principal, still, if he has created such an agency in advance, he has come within the jurisdiction by his agent, as in other cases of contract made within a State from outside, and will be bound. *Flash* v. *Conn*, 109 U. S. 371. *Whitman* v. *Oxford National Bank*, 176 U. S. 559.

The defendant was a principal debtor. *Hyman* v. *Coleman*, 82 California, 650. The fact that the corporation had deposits in the banks that held the notes did not discharge the notes *pro tanto*. *Strong* v. *Foster*, 17 C. B. 201. *National Mahaiwe Bank* v. *Peck*, 127 Massachusetts, 298. The judgment must be reversed and judgment entered for the plaintiff on the agreed facts.

Judgment reversed.

THE CHIEF JUSTICE dissents.

MR. JUSTICE HUGHES took no part in the decision.